Supreme Court, U. S.
FILED
MAR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO.: 79-1460

NATIONAL VAN LINES, INC.,
TRANSPORT INDEMNITY COMPANY,
Petitioners,

v.

JAMES A. RILEY, III, DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. Dept. of Labor, and

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEO A. ROTH, JR.
DENVER H. GRAHAM
1314 - 19th Street, N.W.
Washington, D. C. 20036
Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTIONS	2
QUESTIONS PRESENTED	2
STATEMENT OF CASE	5
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
REASONS FOR GRANTING THE PETITION	7
I. Failure of the District of Columbia Circuit to faithfully adhere to this Court's directive in *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943), constitutes compelling justification for granting the Petition	8
II. The lower Court's conclusion that the District of Columbia and the Eureka—Riley employment relation was "substantial" is based on a clearly erroneous application of the constitutional principles of due process enunciated in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) and *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947)	10
III. The disputes between the Fourth Circuit and the ruling in the case at bar causes confusion constituting compelling justification for granting the Petition	19
CONCLUSION	20
Appendix A	1a
Appendix B	2a
Appendix C	3a
Appendix D	32a
Appendix E	41a
Appendix F	51a

Page

CASES:

B. F. Goodrich Co. v. *Britton*, 78 U.S.App.D.C. 221, 139 F.2d 362 (1943) 13

Bolton v. *Reddy Motors, Inc., et al.*, BRB No.: 78-323 (July 9, 1978) 17

Cardillo v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 476, 67 S.Ct. 801, 806 (1947) 10, 12

Ekar v. *International Union of Operating Engineers*, 1 BRBS 406, BRB Nos.: 74-209, 209A (April 11, 1975) 15

Gudmundson v. *Cardillo*, 75 U.S.App.D.C. 230, 126 F.2d 521 (1942) 14

International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 11

Magnolin Petroleum Co. v. *Hunt*, 320 U.S. 430 (1943)..8, 10

McKenny v. *Capital Crane Corp.*, 321 F. Supp. 880, 883 (D.C.D.C. 1971) 14

Pettus v. *American Airlines*, 587 F.2d, 627 (4th Cir. 1978) Cert. denied, —— U.S. —— (No. 78-1739 10/1/79) 9, 10

Probst v. *Southern Stevedoring Co.*, 379 F.2d 763 (1967) 16

South Chicago Coal & Dock Co. v. *Bassett*, 309 U.S. 251 (1940) 15

Thomas v. *Washington Gas Light Company*, —— U.S. —— Cert. granted (11/26/79 No.: 79-116) 9, 10

Travelers Insurance Co. v. *Cardillo*, 78 U.S.App.D.C. 392, 141 F.2d 362 (1944) 13

U. S. Fidelity and Guaranty Co. v. *Donovan*, 94 U.S. App.D.C. 377, 221 F.2d 515 (1954) 14

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS:

District of Columbia Code, Section 36-501 4

Fourteenth Amendment, U. S. Constitution 3, 4

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 6

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 920(A) 4

United States Constitution, Art. IV, Section 1 3

Code of Virginia, VA. Code, Section 65.1-40 3

MISCELLANEOUS:

A. Larson, *The Law of Workmen's Compensation*, Vol. 4 Section 85.10 20

Restatement of Law Second, Conflict of Laws, Section 181, *Permissible Range of Territorial Application* 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

NATIONAL VAN LINES, INC.,
TRANSPORT INDEMNITY COMPANY,
Petitioners,

v.

JAMES A. RILEY, III, DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Van Lines, Inc. and Transport Indemnity Company, petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

An Order denying Petition for Rehearing dated December 19, 1979 (App. A., no reported decision). An Order denying suggestion for Rehearing en banc dated

December 19, 1979 (App. B, no reported decision). The opinion of the United States Court of Appeals for the District of Columbia Circuit in Director, Office of Workers Compensation Programs v. National Van Lines, Inc., et al, —— F.2d —— No. 78-1259, No. 78-1268 (1979), (App. C). The second decision of the Benefits Review Board dated January 23, 1978. (App. D), reported at 7 BRBS 445 (1978). The initial decision of the Benefits Review Board dated May 6, 1975 (App. E, reported at 1 BRBS 449 (1975). The initial Decision of the Administrative Law Judge dated July 10, 1974. (App., F, unreported.)

JURISDICTION

The decision of the Court of Appeals was made and entered on November 13, 1979. The Order of the Court of Appeals denying the Petition for Rehearing and for suggesting Rehearing En Banc dated December 19, 1979. The Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254 (j).

QUESTIONS PRESENTED

1) Whether the obligation to give full faith and credit as set forth in Article IV, Section 1 of the United States Constitution should be accorded the Virginia Workmen's Compensation Act, including its exclusive remedy provision, Virginia Code § 65.1-40 (1975 Repl. Vol.), and, if so, whether full faith and credit will preclude a subsequent compensation award in the District of Columbia after claimant's voluntary acceptance of workmen's compensation approved by the Industrial Commission of Virginia.

2) Whether the lower court's decision to invoke the jurisdiction of the District of Columbia Workmen's Compensation Act based on their finding that claimant's employment took place in the Washington metropolitan area creates a direct and irreconcilable conflict between that court and the Supreme Court of the United States with respect to constitutional due process under the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IV, §1 of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and, judicial Proceedings of every other State.

The Virginia Workmen's Compensation Act is embodied in Title 65.1 of the Virginia Code, VA. Code, § 65.1-40 (1975 Repl. Vol.), states:

> § 65.1-40. Employee's rights under Act exclude all others.—The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death. (Code 1950, § 65-37, 1968, c. 660)

Section I of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 36, § 501 of the District of Columbia code provides:

> § 36-501 Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia.
>
> > The provisions of Chapter 18 of Title 35, U.S. Code, including all amendments that may hereinafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of such person. (May 17, 1928, 45 Stat. 600 ch. 612, § 1.)

Title 33, U.S.C., § 920(a) provides:

> In any proceeding for the enforcement of or claim for compensation under the Act, it shall presume, in absence of substantial evidence to the contrary—that the claim comes within the provisions of this Act.

STATEMENT OF THE CASE

Respondent Riley entered into an employment contract with Eureka Van & Storage Company in the State of Virginia. He resided in Virginia at all times applicable herein. The principle place of business between the Respondent and Eureka was in Virginia, and the employer's office was in Virginia. Eureka and the Petitioner, National Van Lines, Inc., had an independent agency agreement which allowed Eureka to move goods across state lines on National Van Lines' interstate authority. The principle place of employment and business for Respondent and his employer was the State of Virginia. The Respondent's father vaguely contends that he had in the past either an answering service or office in Virginia.

On January 7, 1966, the Respondent while driving a truck for Eureka was injured when the vehicle with a trailer skidded and struck a bridge abutment. The accident happened in Grand Island, New York. The trailer being towed by Respondent possessed Virginia license plates. The truck being driven by Respondent possessed New York license plates. The trip originated in Virginia and the shipment included six items, one of which was picked up in the District of Columbia, but delivered before the accident occurred. The items were to be delivered in New York, Connecticut, and New Jersey. The Respondent entered the District of Columbia once or twice a week within the five years prior to the accident.

On February 22, 1966, James A. Riley, Sr., President of Eureka Van & Storage Company and, also father of the Respondent, filed an Employer's First Report of Accident with the Industrial Commission of

Virginia. Riley, Sr., signing as Attorney in Fact, signed on behalf of his son, the Respondent, an agreement for compensation on March 8, 1966, with Maryland Casualty Company, the insurer of Eureka Van & Storage Company. On March 30, 1976, the Virginia Industrial Commission approved the agreement allowing maximum benefits under the Act. Maryland Casualty Company paid the maximum benefits to the Respondent.

On May 2, 1972, Respondent filed a claim for benefits in the District of Columbia pursuant to the Longshoremen's and Harbor Workers' Relief Act, 33 U.S.C., 901, *et seq.* Respondent has never filed a written claim against National Van Lines, Inc., or its insurer, Transport Indemnity Company. National Van Lines, Inc. or its carrier were invited by a phone call to participate in the original Informal Conference and subsequent hearings and did do so.

The Administrative Law Judge dismissed the claim on the grounds that the District of Columbia lacks jurisdiction of the claim because of an absence of substantial interest in the employment and the accident to the District of Columbia, and that the claim was barred by limitations. (See App. F) The Benefits Review Board reversed and remanded with a dissenting opinion by board member R. Hartman. (See App. E.)

On remand, the Administrative Law Judge found that Maryland Casualty Company had discharged its obligation as an insurer and that National Van Lines, Inc. was a statutory employer under Section 904 of the Act and, therefore liable to the claimant. National Van Lines appealed the Supplemental Decision. The second decision by the Benefits Review Board ruled

that National Van Lines was not a statutory employer but that Riley, Sr. and Eureka were liable or the special fund in the event Riley, Sr. and Eureka were not solvent. (See App D).

This decision was appealed by the Respondent Riley and the Director, Office of Workers' Compensation Programs, U. S. Department of Labor. The U. S. Court of Appeals for the District of Columbia Circuit ruled that the District of Columbia had subject matter jurisdiction and that National Van Lines was a statutory employer, and that the Statute of Limitations did not bar the claim. Also, the Court affirmed that Maryland Casualty Company had no further liability. There was a dissenting opinion. (See App. C) Petitions for Rehearing and Rehearing En Banc were filed by National Van Lines and same were denied on *December 19, 1979.* (App. A and B)

REASONS FOR GRANTING PETITION

This disposition of this matter involves constitutional doctrine, conflict of laws, res judicata principle and jurisdictional standards.

This Honorable Court is requested to decide two crucial issues, one involving the Full Faith and Credit clause of the Constitution and one involving the due process clause of the Fourteenth Amendment.

It is specifically requested for this Court to declare that an employee who has received Workmen's Compensation benefits from one jurisdiction may not receive same from another jurisdiction without the latter forum violating the Full Faith and Credit clause of the Constitution.

Further, the Court is requested to define when one forum may take subject matter jurisdiction for an extraterritorial industrial injury without violating the due process clause of the Fourteenth Amendment.

The resolution of the above two issues will establish guidelines for the future in determining state sovereignty where as here there are conflicting and overlapping statutory provisions. Further, the resolution of the jurisdictional question will establish guidelines for forum court's inherent power to adjudicate claims for workmen's compensation cases within the requirements of due process. Since the District of Columbia has become a haven for these claims, the resolution of the above issues will enable the Courts and Administrative Agencies involved to have a basis upon which to decide these constitutional issues for numerous pending and future claims.

I

Failure of the District of Columbia Circuit to Faithfully Adhere to This Court's Directive in *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), Constitutes Compelling Justification for Granting the Petition.

This Court's ruling in *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430 (1943) prevents the award of compensation to the Respondent under the constitutional restrictions of the Full Faith and Credit Clause.

In *Magnolia,* an employee received Texas workmen's compensation benefits pursuant to an accident in Texas. Subsequently, he filed a similar claim in Louisiana. The Texas award *being a bar to any further recovery* was, therefore, exclusive of his remedy under Louisiana law pursuant to the Full Faith and Credit clause.

The purpose of the bar was succinctly stated as follows (id. at 439):

> "These consequences flow from the clear purpose of the full faith and credit clause to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be *as conclusive* of the rights of the parties in every other court *as in* that *where the judgment was rendered,* so that a cause of action merged in every other. The full faith and credit clause like the commerce clause thus became a nationally unifying force." (Emphasis added).

In *Pettus* v. *American Airlines,* 587 F.2d 627 (4th Cir. 1978) cert. denied, —— U.S. —— (No. 78-1739, October 1, 1979), the 4th Circuit Court of Appeals reversed and vacated an award of compensation rendered in the District of Columbia on the basis that the employee first received benefits pursuant to the Virginia Act and, therefore, the Full Faith and Credit clause dictated the employee's loss of benefits pursuant to the District of Columbia Act. The factual situation in *Pettus,* cited *supra,* is identical to the case at bar.

Subsequent to the denial of Certiorari in *Pettus,* cited *supra,* this Court granted a Petition for Writ of Certiorari in *Thomas* v. *Washington Gas Light Company,* —— U. S. —— (November 26, 1979 No.: 79-116). Said matter is still pending before this Court. The factual situation in *Thomas,* cited *supra,* is, also, identical to the case at bar. The employee there received Virginia benefits and subsequently attempted to receive District of Columbia benefits. An award was originally granted but on April 27, 1979, the Fourth Circuit in an unpublished *Per Curiam* opinion re-

versed the award on the basis of *Pettus* v. *American Airlines, Inc.*, cited *supra.*

There is, therefore, a direct conflict existing between the result in the case at bar and the decision of *Magnolia, Pettus,* and *Thomas,* all cited *supra.*

As noted, the Fourth Circuit has specifically ruled that the Virginia statute forecloses a second recovery. In so doing, the principles of *Magnolia* have been followed. If the case at bar is allowed to stand, this Court's mandates as set forth in *Magnolia* will be frustrated.

II

The Lower Court's Conclusion That the District of Columbia and the Eureka–Riley Employment Relation Was "Substantial" Is Based on a Clearly Erroneous Application of the Constitutional Principles of Due Process Enunciated in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945) and *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U.S. 469 (1947).

In their opinion, the lower court determined that work or residence in the Washington metropolitan area as opposed to the District of Columbia satisfies the "substantial connection" requirement for workmen's compensation benefits established by this Court in *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U.S. 469, 476 (1947). Thus, according to their opinion, a person or corporate resident in Northern Virginia, without more, establishes an employment relation with the District of Columbia which qualifies candidates for benefits under that jurisdiction's Workmen's Compensation Law.

This reasoning constitutes an impermissibly board and novel expansion of the "minimum contacts" rule established in the landmark decision of *International*

Shoe Co. v. *Washington,* 326 U.S. 310 (1945) and sets a dangerous precedent for the courts to follow in future workmen's compensation cases.

The Supreme Court in *International Shoe* defined what constituted sufficient contacts or ties between a state and a corporate defendant to make it reasonable and just in conformity with due process for the state court to exercise subject matter jurisdiction over the nonresident corporate defendant. The Court held that the activities by a defendant salesman within the state, including exhibiting samples of merchandise in permanent display rooms and soliciting orders from prospective buyers were of a "systematic and continuous" nature. In addition, the foreign corporation defendant in *International Shoe* employed a salesman who maintained a residence within the state, continued his activities over a period of years, and was responsible for a substantial volume of merchandise regularly shipped by the corporation to purchasers within the state.

It is clear that no such systematic and continuous relationship existed between National Van Lines and Eureka Van Lines and the District of Columbia that would allow the District to exercise jurisdiction over National Van Lines or Eureka Van Lines in conformity with due process.

It is, also, quite evident that the Court in *International Shoe* based its decision solely on the basis of for forum court's inherent power to adjudicate claims whether or not the corporation established minimum contacts in the state and whether or not the contacts were sufficient to invoke the state's jurisdiction. Nowhere in the *International Shoe* opinion do the justices state or allude to the possibility that a state could exercise jurisdiction over a non-resident simply because he

lives in the metropolitan area that borders the state. This conclusion is not only unsupported by the opinion, it has never been raised or established by any court in any judicial opinion. A court which bases its jurisdiction solely on these criteria clearly acts outside the scope of permissible exercise of jurisdiction and violates all known principles of "traditional notions of fair play and substantial justice" as noted in the *International Shoe* opinion.

In the leading case of *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U.S. 469, 476, 67 S. Ct. 801, 806 (1947), the Supreme Court clarified the extraterritorial jurisdiction of the D.C. Act by the following language:

> A prime purpose of the Act is to provide *residents* of the District of Columbia with a practical and expeditious remedy for their industrial accidents and to place on the *District of Columbia employers* a limited and determinate liability. (own emphasis added)

In addition, the Supreme Court in *Cardillo* clearly set forth the D.C. Acts extraterritorial reach by promulgating:

> . . . the Districts legitimate interest in providing adequate workmen's compensation measures for its residents does not turn on the fortuitous circumstances of their work or injury. Nor does it vary with the amount or percentage of work performed within the District. * * * *Rather it depends upon some substantial connection between the District and the particular employee-employer relationship* . . . (own emphasis added)

In *Cardillo,* the Supreme Court found the D.C. Act applicable and granted compensation benefits to an employee for injuries he sustained while working in

Virginia. The basis of the decision was predicated on the finding that a "substantial" nexus existed between the District and the employee-employer relationship stemming from the fact that the employee was a resident of the District, his contract of employment was entered into in the District and his employer had its principal place of business in the District.

It is important to note that the *Cardillo* decision did not alter prior case law on the scope of the D.C. Act's extraterritorial jurisdicion, but rather affirmed it. For example, in the case of *B. F. Goodrich Co.* v. *Britton,* 78 U.S. App. D.C. 221, 139 F.2d 362 (1943), an employee of the B. F. Goodrich Company was fatally injured in an automobile accident during a business trip in the State of Pennsylvania. In that case, this court took cognizance of the fact that the deceased employee was a resident of the District and spent at least one-half of his working time at his employer's branch office in the District. As a result of these substantial ties to the District, the D.C. Act was applied by this court.

In *Travelers Insurance Co.* v. *Cardillo,* 78 U.S. App. D.C. 392, 141 F.2d 362 (1944), this court again invoked the extraterritorial jurisdiction of the D.C. Act over the injuries sustained by an employee in Maryland. In that case, jurisdiction was premised on the fact that the employee resided in the District, entered his contract of employment in the District and the employer's principle place of business was in the District.[1] Additionally, the court in *Travelers* further stated that if a claimant pursues a claim to final award

---

[1] See, also *Travelers Insurance Company* v. *Cardillo,* 78 U.S. App. D.C. 394, 141 F. 2d 364 (1944).

in a jurisdiction other than the District, such other award is conclusive on the D.C. Act.

Subsequent case law reiterates the same jurisdictional factors as set forth by the Supreme Court in *Cardillo*. That is, before a compensation claim will be awarded under the D.C. Act for a foreign injury a substantial connection must first be established between a claimant's employment and the District of Columbia. In the case of *U.S. Fidelity and Guaranty Co.* v *Donovan,* 94 U.S. App. D.C. 377, 221 F.2d 515 (1954), this court stated that:

> The particular employee killed or injured need not have been working at the time within the District of Columbia; one comes within the "intent and design" of the statute when, as here, the employer's office, the place of hiring, the employee's residence and other factors provide "some substantial connection between the District and the particular employee-employer relationship". Citing *Cardillo,* supra.

On the other hand, however, when these crucial factors are not present, this court has declined to invoke the extraterritorial reach of the D.C. Act. As noted in *Gudmundson* v. *Cardillo,* 75 U.S. App. D.C. 230, 126 F.2d 521 (1942), jurisdiction of the D.C. Act was denied over an injury occurring in Maryland where the claimant's contract of employment was formulated in Maryland and compensation had already been granted by the State of Maryland.

Likewise, in *McKenny* v. *Capital Crance Corp.,* 321 F. Supp. 880, 883 (D.C.D.C. 1971), the court denied extraterritorial compensation benefits under the D.C. Act when the claimant's accident occurred in Maryland, claimant worked in Maryland, the employer had

his principle place of business in Maryland and the claimant accepted benefits under Maryland's Compensation Law.

In the first opinion concerning this claim dated July 10, 1974, the Administrative Law Judge ruled that the D.C. Act lacked jurisdiction over the matter and denied compensation benefits. In a well supported opinion, the Administrative Law Judge held that his findings of fact failed to indicate that a substantial connection existed between the District and the claimant's employment. Applying the *Cardillo* case, the Administrative Law Judge found the presumption of jurisdiction over the claim rebutted when the overwhelming weight of the evidence supported a contrary result.

On May 6, 1975, the Benefits Review Board, hearing claimant's appeal, reversed and remanded the claim back to the Administrative Law Judge by holding that jurisdiction was proper within the D.C. Act. The Board's order cited only the case of *Ekar* v. *International Union of Operating Engineers,* 1 BRBS 406, BRB Nos. 74-209, 209A (April 11, 1975), in support of their reversal. However, it must be noted that a strong dissent was recorded by one of the Board members in this appeal who firmly agreed with the Administrative Law Judge's factual and legal findings. The dissenting Board member's opinion held that:

> . . . the determination of the Anministrative Law Judge is *conclusive* if supported by record evidence. *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U.S. 251 (1940). Moreover, if it is supported by evidence and not inconsistent with law, an inference drawn by the Administrative Law Judge is conclusive, even where such inference is more legal than factual, when it is evident that the fact-

finder's choice is firmly based on record evidence and is not forbidden by law. Citing *Cardillo,* supra.

On remand, the Administrative Law Judge reluctantly altered his previous position and found jurisdiction within the D.C. Act. Yet, his supplemental opinion firmly argued against jurisdiction of the D.C. Act and only discussed the contrary in the following short paragraph:

> Notwithstanding the foregoing *we must find, in accordance with the Board's Mandate,* that the employer, Eureka Van and Storage Company, Inc., is subject to the provisions of the Act. It follows that Eureka's failure to provide insurance under the Act does not reduce its liability to the employee (33 U.S.C. 904, 905; *Probst* v. *Southern Stevedoring Co.,* 379 F.2d 763 (1967).)

Appeal was again made to the Benefits Review Board from the Administrative Law Judge's second opinion. On this appeal, the Board declined any further comment on the question of jurisdiction, holding that it had already settled the matter.

In viewing the four administrative opinions set forth above, the only legal support given for concluding jurisdiction within the D.C. Act rests on the Board's sole reliance on the case of *Ekar,* supra. The facts of this present claim, however, vary considerably from those found in *Ekar* and must be distinguished. In *Ekar,* jurisdiction was found as a result of the employee being a resident of the District, entering his contract of employment in the District and his employer operating a viable office in the District. Clearly, the uncontroverted facts of this present claim lack the extensive relationship to the District that existed in

Ekar. In the case of bar, at the time of the accident, the claimant was a Virginia resident. His employer was also a Virginia resident. The claimant's employer had his principle place of business in Northern Virginia. The claimant's contract of employment was entered into in Virginia. The tractor that the claimant was driving at the time of the accident had New York plates and not D.C. plates on it. The trailer that claimant was hauling at the time of the accident carried Virginia plates. Furthermore, none of the trucks owned by the claimant's employer were titled in the District or even registered there.

Ostensibly then, none of the important factors are present to support the Board's conclusion that the District had jurisdiction over this claim. In point of fact, the only evidence indicating any type of relationship with the District and this claim are the following:

1. Claimant made itinerant business trips to the District about once or twice a week for about 5 years.

2. The day before the accident, the claimant made a delivery in New York City of a shipment that originated from the District.

3. Vague testimony by the claimant's father that Eureka had a telephone answering service in the District. The Administrative Law Judge dispelled this connection as being unsupported by the evidence.

Based on these unpersuasive facts, the Benefits Review Board found a connection with the District despite the strengths of the evidence to the contrary. Ironically, however, in the recent case of *Bolton* v. *Reddy Motors, Inc. et al.* BRB No. 78-323 (July 9, 1978), the Benefits

Review Board denied compensation benefits in a situation very similar to this one. In *Bolton,* the injury occurred in Maryland, the claimant was a Maryland resident and the claimant's employer had his principle place of business in Maryland. Even though the claimant had frequent business travel within the District of Columbia, the Board refused to grant compensation on the grounds that the claimant's employment failed to equate the substantial connection to the District as required by the D.C. Act.

Throughout the above decisions, it is implicit that before the extraterritorial jurisdiction of the D.C. Act will be invoked, there must first be a substantial connection existing between the District and the employee-employer relationship. Unless the claimants employment evidences this required nexus with the District the jurisdiction of the D.C. Act should not be conferred.

This position is squarely supported by the *Restatement of the Law Second, Conflict of Laws,* Section 181, *Permissible Range of Territorial Application* which provides as follows:

"§ 181. Permissible Range of Territorial Application.

"A State of the United States may consistently with the requirements of due process award relief to a person under its workmen's compensation statute, if

"(a) the person is injured in the State, or

"(b) the employment is principally located in the State, or

"(c) the employer supervised the employee's activities from a place of business in the State, or

"(d) the State is that of most significant relationship to the contract of employment with respect to the issue of workmen's compensation under the rules of §§ 187-188 and 196, or

"(e) the parties have agreed in the contract of employment or otherwise that their rights should be determined under the workmen's compensation act of the State, or

"(f) the State has some other reasonable relation to the occurrence, the parties and the employment."

The Restatement properly summarizes the essential criteria for territorial application of workmen's compensation benefits. The facts of the case at bar do not support a conclusion as reached by this Court that a substantial constitutional connection exists between the Claimant, the accident, and the District.

III

The Disputes Between the 4th Circuit and the Ruling in the Case at Bar Causes Confusion Constituting Compelling Justification for Granting the Petition.

The District of Columbia because of its high benefits has naturally become a haven for all injured employees who come within its jurisdiction. Perhaps the time has come for injured employees to receive higher benefits, but this reasoning cannot interfere with the principles of Full Faith and Credit and due process. These basic principles of our Constitution and Amendments are not elastic enough to permit their stretching to the point of having no meaning. The number of claims filed in the District of Columbia by Virginia residents both before and after receipt of Virginia benefits are numerous.

There exists a conflict between the result reached by the lower court and the results reached by this Court in *Magnolia*, and the Fourth Circuit in *Pettus* and *Thomas*. Confusion necessarily has to exist for the various tribunals called upon to decide the Full Faith and Credit issue as well as the jurisdictional basis.

The geographical proximity of the two jurisdictions makes it common for both Virginia and the District of Columbia to have dual jurisdiction under certain circumstances. The jurisdictional basis is not limited to Virginia and the District of Columbia, since if liberally construed, any clamant in any state may have access to the District of Columbia. Our tribunals need to know what guidelines to use to either accept or not to accept cases where there is an injury outside the boundaries of the District of Columbia.

A. Larson, *The Law of Workmen's Compensation*, Vol. 4, Section 85.10 (1979) succinctly sets forth the problem that exists because of our modern society. He observes that business and transportation are no longer localized, thereby creating problems one might face on a Conflict of Laws exam. Because of the above problems and the vast number of industrial injuries, our tribunals need some rules to enable them to meet not only the needs of claimants but to insure constitutional protection to the employees.

CONCLUSION

This case will enable this Court to guide lower courts and agencies that are confronted with the ever persistent constitutional question of a second recovery as balanced with the Full Faith and Credit clause.

Additionally and as important, this Court will be able to succinctly set forth what factual situation will not violate the due process clause regarding jurisdiction for injuries to workmen outside the District of Columbia boundary.

In order to avoid confusion created by the cited decision and this case in the lower court, the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

LEO A. ROTH, JR.
DENVER H. GRAHAM
1314 - 19th Street, N.W.
Washington, D. C. 20036
785-1200

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing Petition for Writ of Certiorari was mailed, postage prepaid this 14th day of March, 1980, to:

Walter S. Pitsenberger, Esquire
Belair Professional Village, Suite A-24
Bowie, Md. 20715
Attorney for Respondent Riley

Joshua T. Gillelan, II, Esquire
U.S. Department of Labor
200 Constitution Avenue, N.W., Suite N2716
Washington, D.C. 20210
Attorney for Director, Office of Workers' Compensation Programs

Vincent H. Cohen, Esquire
815 Connecticut Avenue, N.W.,
Washington, D.C. 20006
Attorney for Maryland Casualty Co.

LEO A. ROTH, JR.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 78-1259

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

NATIONAL VAN LINES, INC., TRANSPORT INDEMNITY COMPANY, EUREKA VAN & STORAGE COMPANY, MARYLAND CASUALTY COMPANY, AND JAMES A. RILEY, III,
Respondents

And Consolidated Case No. 78-1268

BEFORE: Wright, Chief Judge; Bazelon, Senior Circuit Judge; and Tamm, Circuit Judge

ORDER

Filed December 19, 1979

Upon consideration of respondents' (National Van Lines, Inc., et al.) petition for rehearing, it is

ORDERED, by the Court, that respondents' aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:
/s/ GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 78-1259

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

NATIONAL VAN LINES, INC., TRANSPORT INDEMNITY COMPANY, EUREKA VAN & STORAGE COMPANY, MARYLAND CASUALTY COMPANY, AND JAMES A. RILEY, III,
Respondents

And Consolidated Case No. 78-1268

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, and Mikva, Circuit Judges

ORDER

Filed December 19, 1979

The suggestion for rehearing *en banc* filed by respondents (National Van Lines, Inc., et al.) having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, that respondents' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
Clerk

Circuit Judges Tamm, MacKinnon, Robb, and Wilkey would grant respondents' suggestion for rehearing *en banc.*

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1259

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

NATIONAL VAN LINES, INC., TRANSPORT INDEMNITY COMPANY, EUREKA VAN & STORAGE COMPANY, MARYLAND CASUALTY COMPANY, and JAMES A. RILEY, III,
Respondents

No. 78-1268

JAMES A. RILEY, III, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents

Bill of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Petitions for Review of an Order of the Benefits Review Board of the United States Department of Labor

Argued June 1, 1979

Decided November 13, 1979

Joshua T. Gillelan, II, Attorney, Department of Labor, with whom *Carin Ann Clauss,* Solicitor of Labor, and *Laurie M. Streeter,* Associate Solicitor, were on the brief, for petitioner Director, Office of Workers' Compensation Programs.

Walter W. Pitsenberger for petitioner James A. Riley, III.

Jean S. Moore, with whom *Vincent H. Cohen* and *Alphonso A. Christian, II* were on the brief, for respondent Maryland Casualty Company.

Leo A. Roth, Jr. for respondents National Van Lines, Inc. and Transport Indemnity Company.

Before WRIGHT, *Chief Judge,* BAZELON, *Senior Circuit Judge,* and TAMM, *Circuit Judge.*

Opinion for the court filed by *Chief Judge* WRIGHT.

Dissenting opinion filed by *Circuit Judge* TAMM.

WRIGHT, *Chief Judge:* These cases arise on petitions for review of an order of the Benefits Review Board (Board).[1]

[1] Under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950 (1976), workmen's compensation claims are adjudicated in the first instance before Administrative Law Judges (ALJ). *Id.* § 919(d). Cases that raise substantial questions of law or fact may be heard by an administrative appeals board, called the Benefits Review Board (Board). *Id.* § 921(b)(1) & (3). The three-member Board is a "quasi-judicial" independent body, appointed by the Secretary of Labor, *id.* § 921(b)(1); 20 C.F.R. §§ 801.101-103, 801.201 (1978). Petitions for review of Board orders are heard by the United States Court of Appeals, 33 U.S.C. § 921(c) (1976), *see* note 20 *infra.*

The Board upheld a claim by petitioner James A. Riley, III (Riley) for payments under the District of Columbia Workmen's Compensation Law,[2] in addition to those he had already received under the Virginia statute.[3] Riley's employer, Eureka Van & Storage Company (Eureka), now defunct, and James A. Riley, Sr. (Riley, Sr.), the president and sole shareholder of Eureka and claimant Riley's father, were held liable for the payments. To the extent that Eureka and Riley, Sr. could not satisfy the judgment, the claim would be paid from a special fund created by statute.[4] The Board held that Eureka's insurance carrier, Maryland Casualty Company, was not liable because its policy covered only claims made by Eureka employees under Vir-

Prior to the 1972 amendments claims under the LHWCA were heard in the first instance by deputy commissioners; judicial review was by writ of injunction in the District Courts, 33 U.S.C. § 921 (1970) (amended 1972), with a right of appeal to the appellate courts, 28 U.S.C. §§ 1291-1292 (1970). *See generally In re District of Columbia Workmen's Compensation Act,* 554 F.2d 1075, 1078-1079 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976).

[2] The District of Columbia Code makes applicable to the District of Columbia the provisions of the LHWCA:

> The provisions of chapter 18 of title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

36 D.C. Code § 501 (1973). Certain exceptions, not pertinent here, are listed in 36 D.C. Code § 502 (1973).

[3] Va. Code Ann. § 65.1-1 to 65.1-152 (1973 Repl. Vol. & 1978 Supp.).

[4] The special fund was established pursuant to 33 U.S.C. §§ 944-945 (1976); *see also id.* § 918(b).

ginia law. The Board also held that National Van Lines, Inc. and its insurer, Transport Indemnity Company, were not liable to Riley because National Van Lines could not be considered a general contractor for purposes of the contractor liability provisions of the District of Columbia Act. *Riley v. Eureka Van & Storage Co.*, BRB Nos. 76-259, 259A, 259B, 7 B.R.B.S. 445 (Jan. 23, 1978).[5]

Petitioner Riley urges this court to reverse the decision of the Board with regard to the liability of Maryland Casualty Company, National Van Lines, and Transport Indemnity Company. He is joined in his petition by the Director of the Office of Workers' Compensation Programs (OWCP) for the United States Department of Labor,[6] who challenges only the portion of the order pertaining to National Van Lines and its insurer.

I. Background

Claimant Riley was severely injured in a highway accident on January 7, 1966 in New York State. He is permanently totally disabled, as a quadriplegic. The accident occurred during the regular course of Riley's employment as a driver for Eureka Van & Storage Company, which was serving as an agent for National Van Lines in the haulage of goods in interstate commerce. On the fateful trip Riley was driving a truck marked with the colors and insignia of National Van Lines, under the direction of a dispatcher

[5] Reprinted in Joint Appendix (JA) at 50.

[6] The Director of the Office of Workers' Compensation Programs has standing as a petitioner in this proceeding both because of his official responsibility for administration of the LHWCA and because of his financial interest as administrator of the special fund. *See Director, Office of Workers' Comp. Programs v. Boughman*, 545 F.2d 210 (D.C. Cir. 1976); *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976); *see also Director, Office of Workers' Comp. Programs v. Eastern Coal Corp.*, 561 F.2d 632, 641-649 (6th Cir. 1977).

for National Van Lines. He had picked up goods in the District of Columbia, Virginia, and Maryland to be delivered in New York, Connecticut, and New Jersey. The goods originating in the District of Columbia had been delivered in New York City on the day before the accident.[7]

While Riley was hospitalized Riley, Sr. filed an "Employer's First Report of Accident" with the Industrial Commission of the State of Virginia on February 22, 1966. No report was made to the District of Columbia Workmen's Compensation Commission with respect to Riley's accident or claim until 1972.[8] On March 8, 1966 Riley, Sr., on behalf of his son, executed an agreement with Eureka's insurer, Maryland Casualty, for benefits to be paid to claimant Riley at a rate of $39.00 per week for 400 weeks ($15,600 total), plus all hospital and medical bills for two years following the accident. The Virginia Industrial Commission approved the settlement, which was the maximum award permitted under state law. Notice of Award of the Virginia Industrial Commission, March 30, 1976.[9]

On May 2, 1972 Riley filed a claim with the District of Columbia commission for additional benefits from Eureka and Maryland Casualty under the District of Columbia statute.[10] No written claim was filed against National Van Lines and Transport Indemnity, but they were involved in all stages of the proceeding.[11]

[7] The facts are set forth fully in the first decision and order of the ALJ filed July 23, 1974, JA 6-14. They are essentially undisputed.

[8] In May 1966 Riley, Sr. filed a claim on his son's behalf in New York. The claim was dismissed without prejudice for failure to prosecute on August 9, 1966. JA 12.

[9] JA 11-12.

[10] JA 13.

[11] Brief for respondent Maryland Casualty Company at 8-9, adopted in brief for respondent National Van Lines at 4.

The Administrative Law Judge (ALJ) assigned to the claim dismissed it on two grounds: (1) that the District of Columbia lacked jurisdiction of the claim because of the absence of a substantial and legitimate interest in claimant's employment or accident, and (2) that the claim was barred by the statute of limitations.[12] The Benefits Review Board, in a split decision, reversed on both grounds and remanded.[13] On remand the ALJ reluctantly [14] found Eureka and its president, Riley, Sr.,[15] liable for payments under the District of Columbia law. He further held that Maryland Casualty had fully satisfied its obligations, which were limited to paying claims arising under Virginia law. Finally, he concluded that Eureka was a subcontractor for National Van Lines, and thus that National and its insurer, Transport Indemnity, were jointly and severally liable to the claimant.[16]

On appeal the Benefits Review Board affirmed the ALJ's decision holding Eureka and Riley, Sr. liable for additional payments and Maryland Casualty not liable. The Board reversed on the issue of the liability of National Van Lines and Transport Indemnity and held that, in the event that Eureka and Riley, Sr. were unable to provide the payments, Riley would be compensated from a special fund set up

[12] JA 5-22.

[13] JA 23-31. This decision of the Board was appealed to the United States Court of Appeals for the Second Circuit. The appeal was dismissed because the Board decision was not a final order. JA 37.

[14] A large part of the ALJ's opinion on remand elaborated on his disagreement with the Board over the issues of the jurisdiction of the District of Columbia and the statute of limitations. JA 39-43. This part of the opinion was vacated by the Board on appeal. JA 56.

[15] Riley, Sr.'s liability, not at issue here, is based on 33 U.S.C. § 938(a) (1976).

[16] JA 43-48.

under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).[17]

Claimant Riley and his father have at all relevant times been residents of Virginia.[18] Eureka was a small moving and storage company headquartered in Fairfax County, Virginia and serving the metropolitan Washington, D.C. area. Eureka was covered for workmen's compensation claims by Maryland Casualty Company. The policy expressly limited coverage to claims arising under the law of Virginia. In addition to its Washington area business, Eureka served as an agent for National Van Lines. Pursuant to an "Agency Agreement" with National, Eureka operated trucks in interstate commerce under the Interstate Commerce Commission (ICC) license number of National, displaying the colors and emblems of National. National remained responsible to interstate shippers for carriage under the agreement. Shippers paid National Van Lines directly. National in turn gave instructions to Eureka drivers, exercised some control over the hiring and training of Eureka drivers involved in National Van Lines haulage, and paid Eureka directly for its services. A clause of the agreement required that Eureka furnish workmen's compensation insurance for the Eureka employees.[19]

Before reaching the merits of the liability of Maryland Casualty, National Van Lines, and Transport Indemnity, it is necessary to resolve a question of the jurisdiction of the District of Columbia over this claim.[20]

[17] JA 50-59. *See* 33 U.S.C. §§ 918(b), 944-945 (1976).

[18] JA 103, 180.

[19] JA 6-10.

[20] The dissent questions the jurisdiction of this court. Our jurisdiction is pursuant to 33 U.S.C. § 921(c) (1976):

> Any person adversely affected or aggrieved by a final order of the [Benefits Review] Board may obtain a review of that order in the United States court of appeals for the circuit *in which the injury occurred*, by filing in such court within

II. Jurisdictional Issues

A

The District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501 (1973), is of widest permissible extra-territorial application. It incorporates the substantive and procedural features of the LHWCA, 33 U.S.C. §§ 901-950 (1976), in cases of injury or death of "an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs." The reach of the statute has been limited in accordance with the dictates of the full faith and credit clause of the United States Constitution, U.S. Const., Art. IV, § 1, to cases where there is "some substantial connection between the District and the particular employee-employer relationship * * *." *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 476 (1947). So long as such a "substantial connection" exists, the District of Columbia Act applies and satisfies constitutional strictures. *Id.* The principal jurisdictional issue in this case is whether such a "substantial connection" between Riley's employment relation and the District of Columbia exists.

On the facts, the issue is close. Many of the common indicia of substantial connection,[21] for example, residence of the employee, headquarters of the employer, place of making the employment contract, are absent. For two reasons, however, the usual indicia are of little relevance to this case. First, Riley's residence and Eureka's headquarters were located in a metropolitan area encompassing the District of Columbia and parts of Virginia and Maryland. For most practical purposes, it makes little difference to the parties or to the jurisdictions, in the context of the policies behind the Act, precisely where the home or headquarters is. The most significant geographical division is the metropolitan Washington area. Second, the interstate nature of Eureka's business makes it difficult to pin the employment relation to a specific place. Even Eureka's "local" haulage involved three jurisdictions; under the banner of National Van Lines, Eureka's drivers penetrated many of the states of the Union. Riley, for example, suffered

---

sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. * * *

(Emphasis added.) This provision is made applicable to the District of Columbia by 36 D.C. Code § 501 (1973). Relying on the words "in which the injury occurred," the dissent claims that this appeal should be heard in the Second Circuit rather than this one.

Sensible as this construction of the *Longshoremen's Act* may be, it makes little sense as a construction of the *District of Columbia Workmen's Compensation Act*. It would inevitably lead to inconsistent interpretations of what is essentially parallel to a state workmen's compensation statute. Moreover, the argument of the dissent runs counter to the long and unbroken practice of this court. *E.g., Director, Office of Workers' Comp. Programs v. Boughman, supra* note 6, 545 F.2d at 210; *Amalgamated Ass'n of Street, etc. Employees v. Adler*, 340 F.2d 799 (D.C. Cir. 1964); *U.S. Fidelity & Guaranty Co. v. Donovan*, 221 F.2d 515 (D.C. Cir. 1954); *Jonathan Woodner Co. v. Mather*, 210 F.2d 868 (D.C. Cir.), *cert. denied*, 348 U.S. 824 (1954); *see* additional cases cited in note 34 *infra*. Indeed, one case involving a District of Columbia employee who was injured in Virginia and died as a result, which was reviewed by the United States District Court for the District of Columbia and then in this court, was heard by the Supreme Court with never a doubt about proper appellate jurisdiction. *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947). At all times the statute provided for review in the federal court located where the injury or death occurred. *See, e.g.*, Pub. L. No. 69-803 § 21(b), 44 Stat. 1436 (1927). Consistent with the above authorities, we hold that, for purposes of appellate jurisdiction, injuries giving rise to claims under 36 D.C. Code § 501 "occur" within the territorial jurisdiction of the United States Court of Appeals for the District of Columbia Circuit. *See also Overseas African Constr. Corp. v. McMullen*, 500 F.2d 1291 (2d Cir. 1974). *But see Home Indemnity Co. v. Stillwell*, 597 F.2d 87, 90 (6th Cir. 1979) (dictum); *Pettus v. American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), *petition for cert. filed*, 47 U.S. L. Week 3836 (U.S. No. 78-1739, May 18, 1979); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 448 n.* (4th Cir. 1978).

[21] *See* 4 A. Larson, The Law of Workmen's Compensation § 86.10 at 16-33 (1979).

his injury in New York, while under the direction of a National Van Lines dispatcher in Illinois. Given these two factors, the proper territorial jurisdiction over the case is anything but obvious.

In making our judgment on this petition our discretion to evaluate the jurisdictional facts is doubly limited. First, in our function as a reviewing court we may reverse the decision of the Board only if that decision is unsupported by substantial evidence or inconsistent with applicable law. *Cardillo v. Liberty Mutual Ins. Co., supra,* 330 U.S. at 474; *Marcus v. Director, Office of Workers' Comp. Programs,* 548 F.2d 1044, 1049-1050 (D.C. Cir. 1976).[22]

---

[22] *See also O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359, 362 (1965); *O'Leary v. Brown-Pacific-Mason, Inc.,* 340 U.S. 504, 508 (1951); *Evening Star Newspaper Co. v. Kemp,* 533 F.2d 1224, 1226-1227 (D.C. Cir. 1976); *Associated Indemnity Corp. v. Shea,* 455 F.2d 913, 914 (5th Cir. 1972) (*per curiam*); *Gudmudson v. Cardillo,* 126 F2d 521 (D.C. Cir. 1942). The legislative history of the LHWCA Amendments of 1972, Pub. L. No. 92-576, 86 STAT. 1251 (1972), indicates that judicial review is limited to the "substantial evidence" test. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 12 (1972).

The Second Circuit, in *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 48-50 (2d Cir. 1976), *aff'd sub nom. Northcast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977), suggested that decisions of the Benefits Review Board on the coverage of the LHWCA are not entitled to much deference from the courts. *Accord, Stockman v. John T. Clark & Son of Boston, Inc.,* 539 F.2d 264, 269-270 (1st Cir. 1976), *cert. denied,* 423 U.S. 908 (1977). At least in cases regarding the reach of the D.C. Act, we cannot agree. It would be a poor use of judicial resources for this court to decide for itself whether in each occurring permutation of jurisdictional facts the case is sufficiently related to the District of Columbia to fall within the Act. This we leave to the Board, which is more familiar with the range of factual situations. We will not upset the Board's determinations lightly.

The Director of the Office of Workers' Compensation Programs has not challenged the Board's conclusion that the D.C. Act applies to this case. Had he done so, our reviewing function might be different. *See* —— F.2d at —— (p. 24) *infra.*

Second, we are bound by the congressionally-mandated "presumption of jurisdiction."[23] The LHWCA provides:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a) (1976). As the Supreme Court has observed, this presumption of jurisdiction "applies with equal force to proceedings under the District of Columbia Act." *Cardillo v. Liberty Mutual Ins. Co., supra,* 330 U.S. at 474. Moreover, the workmen's compensation statute at issue, being designed to alleviate the suffering of injured workers by spreading the cost of their injuries among the purchasers of their products, must be interpreted liberally in favor of

---

[23] *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533, 541 (5th Cir. 1976), *cert. denied,* 433 U.S. 908 (1977); *Overseas African Constr. Corp. v. McMullen, supra* note 20, 500 F.2d at 1294. *Contra, Employers Mutual Liability Ins. Co. of Wis. v. Arrien,* 244 F.Supp. 110, 113 (N.D. N.Y. 1965).

The Second Circuit, in *Pittston Stevedoring Corp. v. Dellaventura, supra* note 22, 544 F.2d at 48, commented that the "'presumption' of coverage" is "not • • • particularly helpful in determining where the line should be drawn between employment covered by the LHWCA and employment not so covered. *Accord, Stockman v. John T. Clark & Son of Boston, Inc., supra* note 22, 539 F.2d at 269. The court recognized, however, that once the line has been drawn, the presumption "come[s] into play in ruling on cases near the border." 544 F.2d at 48. In the present case the line has long been drawn at the point where the District of Columbia's interest in the employment relation or the accident is "substantial"; the presumption is therefore "helpful" to us in deciding this case, which admittedly falls "near the border."

injured claimants. *Evening Star Newspaper Co. v. Kemp*, 533 F.2d 1224, 1227 (D.C. Cir. 1976).[24]

In view of these two limitations, it is not surprising that no case has been brought to our attention, nor has one been found, in which this court has *reversed* the Board (or the deputy commissioner under the pre-1972 system) in favor of a *more restrictive* view of the extra-territorial reach of the statute. Of course, should the Board seek to extend its jurisdiction to cases involving employment relations without significant connection to the District of Columbia, we shall not hesitate to reverse. This is not such a case.

Eureka's principal service area was the metropolitan Washington, D.C. area, including northern Virginia, the Maryland suburbs, and the District.[25] Although the headquarters of the company were located in Virginia, there is no dispute over the fact that it served many customers in the District and regularly sent its employees into the District in connection with the business.[26] Riley himself

[24] *Accord, Northeast Marine Terminal Co. v. Caputo, supra* note 22, 432 U.S. at 268; *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 177 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977); *Tampa Ship Repair & Dry Dock Co. v. Director, Office of Workers' Comp. Programs*, 535 F.2d 936, 938 (5th Cir. 1976) (*per curiam*).

[25] The "place where the industry is localized" is a well recognized contact that supports assertion of jurisdiction over workmen's compensation claims. 4 A. LARSON, *supra* note 21, § 86.10 at 16-33. "[T]he place where the industry is localized has a special interest, in that the burdens and costs of compensation fall most directly upon employers and consumers in the area where the industry is centered." *Id.* § 86.34 at 16-42.

[26] There is testimony in the record by Riley, Sr. that Eureka maintained a telephone answering service in the District. JA 210. The ALJ rejected the evidence as unreliable. JA 39-40. It does not matter whether or not Eureka maintained such a service; it suffices to note that Eureka had customers in the District and its business was centered there.

went into the District on Eureka business on an average of once or twice a week for five years.[27] The centering of Eureka's business in the Washington, D.C. area is especially important, for the customers of the employer ultimately bear the cost of compensation payments. Since Eureka principally serviced Washington and its environs, many District residents could be affected by the outcome of this controversy.[28]

The interests of a jurisdiction in workmen's compensation cases are primarily that those employees who work within its boundaries be adequately protected and that those employers who operate extensively within its boundaries be fairly limited in their liability. On this score the District of Columbia has as strong an interest, perhaps stronger, as Virginia or any other state.

It is important to bear in mind that in workmen's compensation cases, unlike many controversies over choice of law, it is not necessary to identify one jurisdiction with predominant contacts or interests. The test of jurisdiction is not whether the proposed forum has interests greater than those of some other forum, but rather whether the proposed forum's interest is "legitimate and substantial in itself." 4 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 86.35 at 16-43 (1979).[29] So long as a set-off of previous

[27] JA 10.

[28] In this case Eureka is defunct and will therefore be unable to pass on any costs of workmen's compensation to customers. The contacts with the jurisdiction, however, are evaluated for jurisdictional purposes as of the time of the injury.

[29] This principle was firmly established in *Industrial Comm'n v. McCartin*, 330 U.S. 622 (1947). *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 182 (1971): "Relief may be awarded under the workmen's compensation statute of a State of the United States, although the statute of a sister State also is applicable."

awards in other jurisdictions is made,[30] thereby avoiding duplicative recovery, a state or district with substantial contacts to an employment relation may apply its compensation laws without regard to whether another jurisdiction has or could have asserted jurisdiction.[31]

---

[30] *See* 4 A. LARSON, *supra* note 21, § 85.70 at 16-30 to 16-32.

[31] In view of *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), an opinion whose authority has been eroded but which has not been overruled, *see Industrial Comm'n v. McCartin*, *supra* note 29, 330 U.S. at 622, a problem under U.S. Const. Art. IV, § 1 and 28 U.S.C. § 1738 (1976) is raised: Does the decision of the Board deny full faith and credit to the prior decision of the Virginia Industrial Commission? In *Pettus v. American Airlines, Inc.*, *supra* note 20, 587 F.2d at 627, the Fourth Circuit faced this question on similar facts. In *Pettus* an employee hired in the District of Columbia by an airline company carrying on employment in the District of Columbia was injured while working in Virginia. He received an award under the Virginia compensation statute, Va. Code Ann. §§ 65.1.1 to 65.1-152 (1973 Repl. Vol. & 1978 Supp.). He subsequently was awarded benefits by the Benefits Review Board under the District of Columbia compensation statute, 36 D.C. Code §§ 501-502 (1973). On review before the Fourth Circuit, *see* note 20 *supra*, the court held that the Virginia statute, Va. Code Ann. §§ 65.1-1 to 65.1-152 (1973 Repl. Vol. & thus that the Board's award to Pettus was prohibited by the full faith and credit clause of the Constitution.

We cannot agree. Instead, we adopt the reasoning of another panel of the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co. v. Director, Office of Workers' Comp. Programs*, 583 F.2d 1273 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979). That panel held that the Virginia statute does not preclude recovery under the District of Columbia Act. 583 F.2d at 1277-1278. The Supreme Court has made clear in *Industrial Comm'n v. McCartin*, *supra* note 29, 330 U.S. at 628, that "[o]nly some unmistakable language by a state legislature or judiciary" would warrant the conclusion that a state workmen's compensation statute is intended "to cut off an employee's right to sue under other legislation passed for his benefit." The Virginia statute provides, "The rights and remedies herein granted to an employee * * * shall exclude all other rights and remedies of such employee * * * at common law or otherwise * * ." Va. Code Ann. § 65.1-40 (1973 Repl. Vol.).

Here the contacts between the District of Columbia and the Eureka-Riley employment relation are substantial enough that this court, faced with the presumption of jurisdiction and with a determination by the Board that the injury is covered by the District of Columbia Act, must conclude that the District of Columbia Act applies.

This case presents a stronger case for application of District of Columbia law than that presented by *Director, Office of Workers' Comp. Programs v. Boughman*, 545 F.2d 210 (D.C. Cir. 1976). In *Boughman* we adopted the reasoning of the Benefits Review Board finding the compensation claim covered by the District of Columbia compensation statute. *Id.* at 211. Claimant was a representative of a national labor union, murdered while meeting at a union

---

This language has been interpreted to preclude other Virginia common law and statutory remedies, *see Eighteenth Annual Survey of Developments in Virginia Law: 1972-1973*, 59 VA. L. REV. 1400, 1632 (1973). We do not interpret it as precluding remedies to which workers are entitled under the laws of other jurisdictions. *See* 4 A. LARSON, *supra* note 21, §§ 85.30, 85.40 at 16-19 to 16-26.

Nor is the Board prevented from awarding additional benefits by the principles of *res judicata* or collateral estoppel. Since the Virginia statute does not preclude an additional award under the District of Columbia law, the Virginia proceeding cannot determine the amount of recovery under the District of Columbia provisions. Whatever effect the factual determinations and inferences of the Virginia Industrial Commission may have in the subsequent District of Columbia proceeding, there is no doubt that the Board may reach its own independent decision on the size of the award. *See, e.g., Newport News Shipbuilding & Dry Dock Co v. Director, Office of Workers' Comp. Programs, supra; Director, Office of Workers' Comp. Programs v. Boughman, supra* note 6, 545 F.2d at 210; *Peter v. Arrien*, 325 F.Supp. 1361, 1366 (E.D. Pa. 1971), *aff'd*, 463 F.2d 252 (3d Cir. 1972) (*per curiam*). In each of these cases the courts affirmed the LHWCA awards even though the claims had previously been adjudicated by state workmen's compensation commissions. *But see Pettus v. American Airlines, Inc.*, *supra* note 20, 587 F.2d at 628-629.

hall in California with a representative of the local.[32] The Board assumed jurisdiction even though the claimant resided in California, was killed in California, and was directed in his work by a regional officer in the western United States. The contacts with the District of Columbia included the employer's national headquarters, the origin of the claimant's paychecks and travel reimbursements, the administration of claimant's pension fund, and (by inference) the place of the making of the employment contract. Claimant also traveled occasionally to the District on business.[33] Since jurisdiction was upheld in *Boughman*, we must certainly uphold it here.[34]

B

Claimant Riley filed his claim in the District of Columbia on May 2, 1972, some six years after his accident occurred.[35] The ALJ ruled that his claim was barred by the statute of limitations and also by laches.[36] This conclusion was

---

[32] The facts of *Boughman* are set out in the Board's opinion, *Ekar v. International Union of Operating Engineers*, BRB Nos. 74-209, 209A, 1 B.R.B.S. 406 (April 11, 1975).

[33] *Id.*

[34] Other cases in which this court has applied the extraterritorial provision of the District of Columbia Act to award compensation in cases where death or injury occurred outside the District include *U.S. Fidelity & Guaranty Co. v. Donovan*, *supra* note 20, 221 F.2d 515; *Travelers Ins. Co. v. Cardillo*, 141 F.2d 362 (D.C. Cir. 1944); *Travelers Ins. Co. v. Cardillo*, 141 F.2d 364 (D.C. Cir. 1944); *B. F. Goodrich Co. v. Britton*, 139 F.2d 362 (D.C. Cir. 1943). *But cf. Gasch v. Britton*, 202 F.2d 356 (D.C. Cir. 1953) (upholding deputy commissioner's decision that Maryland injury to Maryland resident was not covered by the District of Columbia Act, although the employment contract was made in the District of Columbia).

[35] JA 13.

[36] JA 19-22, 42-43.

reversed by the Board.[37] The Board's decision is challenged by respondents Maryland Casualty, National Van Lines, and Transport Indemnity.

Under the LHWCA an injured worker must file a claim for compensation within one year after his injury or be barred, subject to certain tolling provisions. 33 U.S.C. § 913 (1976).[38] This limitation is mandatory and jurisdictional in nature. *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146, 148 n.3 (3d Cir. 1975); *Young* v. *Hoage*, 90 F.2d 395, 397 (D.C. Cir. 1937); *see also Pillsbury v. United Engineering Co.*, 342 U.S. 197 (1952). The parties agree that Riley failed to file his claim in the District until after the one-year period had expired.

But 33 U.S.C. § 930(f) (1976) tolls the statute of limitations during the period that the employer fails to report the injury to the Secretary of Labor.[39] In effect, the stat-

---

[37] JA 30-31, 56.

[38] 33 U.S.C. § 913(a) (1976) provides:

> Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefor[] is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

[39] 33 U.S.C. § 930 (1976) provides in relevant part:

> (a) Within ten days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and oc-

ute of limitations does not begin to run on an injured employee's claim under the District of Columbia Act until after the employer has reported the injury to the Secretary. *United Brands Co. v. Melson*, 594 F.2d 1068, 1070-1073 (5th Cir. 1979); *Associated Indemnity Corp. v. Shea*, 455 F.2d 913, 915 (5th Cir. 1972) (*per curiam*). Although Eureka reported Riley's accident to the Virginia Industrial Commission, the company has never made the report to the Secretary and to the compensation district as required by the LHWCA. By the clear import of the statute, the limitations period is tolled.

The respondents, employers and their insurers, however, urge this court to adopt a construction of the tolling provision of Section 930(f) more in line with its "purpose" to encourage reporting of work-related accidents to the proper authorities. They contend that Eureka's report to the Virginia commission fulfills this purpose. We cannot adopt a reading of the statute that would enable respondents to escape the responsibility placed upon them by the

---

cupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred.

* * * * *

(f) Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 913 of this title shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section.

clear words of the statute. Such a reading would not be consistent with the overriding purpose of the LHWCA, which is to provide adequate compensation to injured workers. *See Blackwell Constr. Co. v. Garrell*, 352 F.Supp. 192, 196-197 (D. D.C. 1972).

Nor can we agree that Riley is barred from pursuing his claim by the doctrine of laches. Even were we to rule that the congressional decision to toll the statute of limitations in cases such as this may be overridden by the exercise of our equity power, this would be a highly inappropriate case for such action. *See Peter v. Arrien*, 325 F. Supp. 1361, 1366 (E.D. Pa. 1971), *aff'd*, 463 F.2d 252 (3d Cir. 1972). After the accident Riley was in no position to investigate his rights under District of Columbia law; he merely accepted the lesser payments that his father arranged for him under Virginia law. He was not informed of his rights to additional compensation under the District of Columbia law until he consulted a new attorney in March 1972.[40] He filed the District of Columbia claim less than two months later. We recognize the hardship to Riley, Sr. and to National Van Lines caused by the intervening demise of Eureka; however, we cannot exercise the equitable powers of the court so as to deny Riley the the much-needed benefits to which he is entitled under the law.[41]

---

[40] *See* JA 13.

[41] Respondent Maryland Casualty Company has also argued that Riley should be estopped from asserting the tolling provisions of § 903(f) because his father, as president of Eureka, had a conflict of interest in the case. Brief for respondent Maryland Casualty at 35. In this argument Maryland Casualty echoes the ALJ's opinion on remand. JA 43. Without pausing to consider whether Riley Sr.'s conduct satisfied all the elements necessary to an invocation of estoppel, we conclude that it would be inequitable to visit the consequences of the father's conflict of interest upon his disabled son.

III. Liability of Maryland Casualty

The parties have stipulated that the workmen's compensation insurance policy issued by Maryland Casualty to Eureka stated that it was limited to compensation claims arising under Virginia law.[42] The ALJ therefore decided that Eureka was an uninsured employer under the District of Columbia Act. Since Maryland Casualty had fully satisfied its obligations to Eureka and to Riley under its insurance with Eureka, he held that Maryland Casualty is not liable to Riley for any additional payments under District of Columbia law.[43] This holding was affirmed by the Board.[44]

Petitioner Riley challenges the Board order absolving Maryland Casualty of liability under the District of Columbia Act. He argues that by operation of 33 U.S.C. § 935 (1976) [45] the Maryland Casualty policy may be con-

[42] Stipulation No. 7, JA 263.

[43] JA 43-44

[44] JA 56-57.

[45] 33 U.S.C. § 935 (1976) provides:

> In any case where the employer is not a self-insurer, in order that the liability for compensation imposed by this chapter may be most effectively discharged by the employer, and in order that the administration of this chapter in respect of such liability may be facilitated, the Secretary shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of the employer in respect to such liability, imposed by this chapter upon the employer, as it considers proper in order to effectuate the provisions of this chapter. For such purposes (1) notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier, (2) jurisdiction of the employer by a deputy commissioner, the Board, or the Secretary, or any court under this chapter shall be jurisdiction of the carrier, and (3) any requirement by a deputy commissioner, the Board, or the Secretary, or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer.

strued as covering all workmen's compensation liability of Eureka, under the law of any jurisdiction. In this argument he is mistaken. Section 935, by its terms, applies only in cases "where the employer is not a self-insurer • • •" [46] In this case Eureka knowingly neglected to procure insurance against liability under the laws of jurisdictions other than Virginia.[47] No law operates to give Eureka greater coverage than it was willing to pay for. With respect to District of Columbia liability, Eureka was a self-insurer. *See Rex Investigative & Patrol Agency, Inc. v. Collura,* 329 F.Supp. 696, 699-700 (E.D. N.Y. 1971); *Smith v. Continental Nat'l American Group,* 321 F.Supp. 1354, 1355 (E.D. La. 1971).

We find no reason to reverse the Board with regard to the liability of Maryland Casualty.

IV. Liability of National Van Lines and Transport Indemnity

The final issue raised in this petition is the liability of National Van Lines and its insurer, Transport Indemnity Company, as the "contractor" of Eureka's interstate busi-

[46] *Id.*

[47] There is some dispute over why Eureka failed to purchase broader coverage from Maryland Casualty. JA 8-10. The ALJ concluded, on the basis of conflicting testimony, that Riley, Sr., on behalf of Eureka,

> knowingly and intentionally purchased workmen's compensation insurance in Virginia only; • • • rejected coverage elsewhere; • • • and did not refuse D.C. coverage because he was misled, or because he expected National [Van Lines] to provide it, but because it was more expensive, and not necessary to satisfy the law of his domicile, (Virginia). • • •

JA 14-15. This conclusion, based on evaluation of the credibility of testimony, is accepted by this court.

ness. Section 904(a) of the LHWCA provides in relevant part:

> In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

National Van Lines is liable to Riley under this provision if, and only if, Eureka served as a subcontractor to National within the meaning of the statute. The ALJ ruled that Eureka was such a subcontractor of National Van Lines,[48] but this ruling was reversed by the Board.[49] The Board's decision is appealed to this court by petitioners Riley and the Director of OWCP.

A

The basis for the Board's decision is not fully clear from its opinion. After setting out the law governing the imposition of workmen's compensation liability on general contractors,[50] the Board stated without further explanation:

> The relationship of National Van Lines and Eureka Van Lines[,] the Board concludes, is not the contractor-subcontractor relationship contemplated by Section 4 [33 U.S.C. § 904]. We agree with National Van Lines that Eureka was acting under an independent agency or contractor agreement * * *.

JA 57.

Ordinarily, our review of such decisions by the Board is limited: the decision will be affirmed unless it is unsup-

[48] JA 44-45.

[49] JA 57.

[50] *See* —— F.2d at —— (p. 27) *infra*.

ported by substantial evidence or inconsistent with applicable law.[51] Such deference is made difficult in this case by the failure of the Board to explain how its conclusion follows from its statement of the facts. Moreover, we should note that we are freer to undertake an independent examination of this portion of the case because the Director of OWCP opposes the Board's decision on the liability of National Van Lines and Transport Indemnity. *Cf. General Electric Co. v. Gilbert*, 429 U.S. 125, 144-145 (1976) (difference in interpretation of Title VII by Equal Employment Opportunity Commission and Wage and Hour Administrator prevented the Court from strict deference to the appropriate agency). Since OWCP is the policymaking body in the area of workmen's compensation,[52] and since the Board's decision involves a policy judgment, we believe that this conflict between agencies necessitates a more searching review by this court.

B

The "Agency Agreement" in effect between Eureka and National Van Lines at the time of Riley's accident did not employ the words "contractor" or "subcontractor" with respect to the parties.[53] Eureka was denominated an "agent" of National Van Lines; the agreement specifically disclaimed by any employer-employee relation between National Van Lines and Eureka or its employees. Obviously, the terminology used in the agreement is not dispositive of this case.

Eureka did not possess an ICC Motor Carrier's license of its own. It therefore could not, and did not, transport

[51] *See* text and note at note 22 *supra*.

[52] 20 C.F.R. §§ 1.1, 1.2 (1979); *id.* §§ 701.201, 701.202 (1978).

[53] The facts surrounding the relationship between Eureka and National Van Lines are recounted in the original decision of the ALJ. JA 6-8. There is no significant dispute by the parties over the facts.

cargo outside the Washington, D.C. metropolitan area except as an agent of National Van Lines. Eureka conducted its interstate haulage in the name of National Van Lines, in accordance with National's instructions expressed in a manual called the "Agent's Guide," in trucks decorated with National's name, colors, and insignia. Although Eureka was not contractually obligated to accept any particular shipment for National's customers, in practice Eureka solicited orders for National and made extensive deliveries under National's direction. The contractual obligations for interstate haulage remained with National Van Lines, as did the right to payment. Although Eureka retained substantial discretion over the details of its operations, National reserved the right to train Eureka employees involved in performing National's contracts, and to reject employees who did not successfully complete this training.

This court has never interpreted the general contractor's liability provision of Section 904(a). In doing so now, we are guided by the experience of the many jurisdictions with similar provisions that have considered the question.[54] We are also guided by the purpose of the provision, which is to protect injured employees engaged in a common enterprise from the irresponsible failure of their immediate employers to insure. By imposing secondary liability on the general employer or contractor, the provision deters unscrupulous employers from dividing their work among a number of smaller, uninsured entities, and creates an incentive for the general employer to insist that his subcontractors be adequately insured.[55]

---

[54] Forty-one states and the District of Columbia impose secondary liability for workmen's compensation upon general employers for the benefit of employees of contractors under them. 1B A. LARSON, *supra* note 21, § 49.10 at 9-1 to 9-2.

[55] *Id.* § 49.11 at 9-6 to 9-9.

A general employer will be held secondarily liable for workmen's compensation when the injured employee was engaged in work either that is a subcontracted fraction of a larger project or that is normally conducted by the general employer's own employees rather than by independent contractors.[56] The most common form of the relationship—and that represented by the Eureka-National agreement—is where the general employer delegates the performance of portions of its contractual obligations to other firms.

For example, in *DeMola v. Riccio,* 61 App. Div. 2d 854, 401 N.Y.S.2d 919 (3d Dep't 1978), the general employer, a towing company, contracted with the city to remove abandoned vehicles from the streets. It further arranged with a second towing company—the immediate employer of the injured worker—for the second company to perform some of the work in exchange for the right to the proceeds of the sale of the scrapped vehicles. This second firm was not adequately insured. When the injured employee sought further payments, the court held the general employer liable. In *Thorsheim v. State,* 469 P.2d 383, 388-389 (Alaska 1970), the court announced these two requirements for the relationship, under a statute substantially identical to the District of Columbia provision: (1) the existence of a contractual obligation on the part of a person held to be a contractor, and (2) a subletting of a part of that obligation to the person held to be a subcontractor.[57]

This statement of the law does not differ substantially from that expressed by the Board in its opinion. The Board said that Section 904 has been applied "in cases where a contractor entered into a contract with a third party to

---

[56] *Id.* § 49.12 at 9-33.

[57] *Accord, McCaskey v. Daniel International Corp.,* 422 F.Supp. 1360 (D. S.C. 1977); *Jenkins v. Peddic,* 145 So.2d 729 (Fla. 1962); *Evans v. Hawkins,* 114 Ga.App. 120, 150 S.E.2d 324 (1966); *Brygidyr v. Rieman,* 31 N.J.Super. 450, 107 A.2d 59 (N.J. 1954).

perform a service. The contractor then delegated its duties to the subcontractor." JA 57. The Board's error was not in its statement of the law, but in the application of that law to the facts of this case. National Van Lines contracted with various shippers to carry cargo interstate; it then delegated a portion of its contracts to Eureka. There is no doubt that Eureka employees performed work that would normally be performed by National Van Line's own employees. Applying the generally accepted test for contractor liability, we must conclude that National Van Lines is liable under Section 904.

To accept the Board's conclusion would allow National Van Lines to avoid liability to workers performing National's contracts, even though National's subcontractor was inadequately insured. This would defeat the purpose of Section 904(a) and, more important, deny the benefit of the law to injured workers who need its protection.[58]

National Van Lines cannot complain of unfair surprise in this decision. In its agreement with Eureka, National required that Eureka obtain workmen's compensation insurance as required by law.[59] The reason National would impose such a requirement is to protect itself from liability under Section 904(a). National Van Lines could have avoided any Section 904(a) liability simply by ensuring that Eureka comply with the contract. Having failed to enforce its contractual rights, National may not now shift its loss to the hapless Riley.

---

[58] National Van Lines has asserted that its relationship to Eureka was that of "owner" to contractor, based on the fact that National is the owner of the ICC license that Eureka used. Brief of respondent National Van Lines at 16. This argument is without merit. The "owner" cases are exemplified by the situation in which a property owner contracts with a contractor for services to the property. Obviously, the Eureka-National Van Lines agreement did not fit this pattern.

[59] *Id.* at 7.

V. Conclusion

The decision of the Benefits Review Board, BRB Nos. 72-259, 259A, 259B, 7 B.R.B.S. 445 (Jan. 23, 1978), is reversed with respect to the liability of National Van Lines and its insurer, Transport Indemnity Company, to claimant James A. Riley, III. In all other respects the decision is affirmed.

So ordered.

TAMM, *Circuit Judge,* dissenting: Despite the mental pole-vaulting of the majority, I am unable to agree with its decision in these cases.

First, I cannot conclude that the workers' compensation statute of the District of Columbia, D.C. CODE § 36-501 (1973), has any application to Petitioner Riley's injuries. At the time of the accident, Riley was a resident of Virginia. His principal place of employment was Virginia. His employer, Eureka, was a Delaware corporation that had its principal place of business in Virginia and directed Riley's activities from Virginia. National Van Lines, which had engaged Eureka as its agent, had its principal office in Illinois. The accident occurred in New York after all goods shipped from the District of Columbia had been delivered. None of the facts in these cases suggests a connection to the District of Columbia that justifies applying its laws to Riley's claim. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 181 (1971).

Second, even if this matter did fall under the District of Columbia statute, this court would not have subject matter jurisdiction to hear these petitions for review. Section 21(c) of the Longshoremen's and Harbor Workers' Compensation Act provides for review "in the United States court of appeals for the circuit *in which the injury occurred* . . . ." 33 U.S.C. § 921(c) (1976) (emphasis added). The accident in the cases before us occurred in New York, which is in the Second Circuit, not this one. Review is proper there, not here. *See Home Indemnity Co. v. Stillwell,* 597 F.2d 87, 90 (6th Cir. 1979), cert. denied, 48 U.S.L.W. 3221 (Oct. 1, 1979). Because this is a matter of jurisdiction, not venue, we should dismiss the petitions rather than acquiesce in the parties' decision not to press the issue further.*

* On June 21, 1978, a panel of this court denied a motion by Respondents National Van Lines and Transport Indemnity to dismiss the petitions for want of jurisdiction. The panel nevertheless entered its order without prejudice to the movants' raising the issue again when the cases would be heard on the merits. Director, Office of Workers' Compensations Programs v. National Van Lines, Inc., Nos. 78-1259, 78-1268 (D.C. Cir. June 21, 1978) (order per curiam). National Van Lines and Transport Indemnity earlier had indicated their willingness to withdraw their objections if the panel denied their motion. Reply to Response of the Director, Office of Workers' Compensation Programs, in Opposition to Motions to Dismiss (Apr. 28, 1978). Thus, the parties neither briefed this issue nor discussed it at oral argument. It is well settled, however, that the parties to an action cannot confer jurisdiction by consent; rather, it is our obligation to raise questions of jurisdiction sua sponte. *E.g.,* Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379 (1884); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 8, at 18 (3d ed. 1976). *See* cases cited *id.* at 18 n.8. The doctrine of the law of the case does not prevent us from reopening this issue, for we are "duty-bound" to recognize our lack of jurisdiction, no matter how late. Potomac Passengers Ass'n v. Chesapeake & O. Ry., 520 F.2d 91, 95 n.22 (D.C. Cir. 1975).

Cf. Atlantic Ship Rigging Co. v. McLellan, 288 F.2d 589 (2d Cir. 1961) (predecessor to 33 U.S.C. § 921(c), which provided for initial review in the district court for the judicial district in which the injury occurred, confers jurisdiction; it does not concern simply venue); *Continental Fire & Casualty Insurance Co. v. O'Leary,* 236 F.2d 282 (9th Cir. 1956) (same).

Because District of Columbia law does not govern Riley's claim and because this court would not have subject matter jurisdiction to hear these petitions even if District of Columbia law were to apply, I respectfully dissent.

APPENDIX D

U.S. DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD

Washington, D.C. 20210

BRB No. 76-259

NATIONAL VAN LINES, INC.

and

TRANSPORT INDEMNITY COMPANY,
Employer/Carrier, Petitioners

v.

JAMES A. RILEY, III, *Claimant*

and

EUREKA VAN AND STORAGE COMPANY, *Employer*

and

MARYLAND CASUALTY COMPANY, *Carrier-Respondents*

BRB No. 76-259A

JAMES A. RILEY, III, *Claimant-Petitioner*

v.

NATIONAL VAN LINES, INC.

and

TRANSPORT INDEMNITY COMPANY,

and

EUREKA VAN AND STORAGE COMPANY

and

MARYLAND CASUALTY COMPANY,
Employer/Carriers-Respondents

BRB No. 76-259B

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *Petitioner*

v.

EUREKA VAN AND STORAGE COMPANY

and

MARYLAND CASUALTY COMPANY

and

NATIONAL VAN LINES, INC.

and

TRANSPORT INDEMNITY COMPANY,
Employer/Carriers-Respondents

DECISION

Filed as Part of the Record Jan. 23, 1978

Appeals from the Supplemental Decision and Order of John I. Nevin, Administrative Law Judge, United States Department of Labor.

Walter W. Pitsenberger, Bowie, Maryland, for the claimant.

M. S. Mazzuchi, Rockville, Maryland, for Eureka Van & Storage and Maryland Casualty Company.

Leo A. Roth, Jr. (Brault, Graham, Scott & Brault), Washington, D.C., for National Van Lines, Inc. and Transport Indemnity Company.

Joshua T. Gillelan, II (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., United States Department of Labor.

Before: SMITH, Chairman and MILLER, Member.

MILLER, Member:

These are appeals by the claimant, National Van Lines and Transport Indemnity Company and the Director, Office of Workers' Compensation Programs, from a Supplemental Decision and Order (73-DCWC-86) of Administrative Law Judge John I. Nevin, pursuant to the provisions of the Longshoremen's and and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended to the District of Columbia, 36 D.C. Code § 501 *et seq.* (hereafter referred to as the Act).

The facts of this case were set forth in the Board's prior Decision, reported at 1 BRBS 449, BRB Nos. 74-155, 74-155A (May 6, 1975), as follows:

The claimant was employed as a truck driver by Eureka Van and Storage Company (hereafter, Eureka). On January 7, 1966, in the course of his employment, he was involved in an accident at Grand Island, New York. He sustained fractures of the fourth and fifth cervical vertebrae with complete transection of the spinal cord. As a result of this injury, the claimant is a quadriplegic, confined to a wheelchair.

At the time of the accident, Eureka was a Delaware corporation with its principal place of business in Fairfax County, Virginia. Eureka also maintained an office in the District of Columbia for telephone answering services. As a local carrier, Eureka operated in the Washington, D.C., commercial zone, which embraced Northern Virginia, suburban Maryland and the District of Columbia. As an agent of National Van Lines, Inc. (hereafter, National), Eureka was authorized to move shipments in interstate commerce, using the motor carrier license number issued to National by the Interstate Commerce Commission. Pursuant to the "Sales, Service and Hauling Agreement" in effect between the companies, all Eureka vehicles displayed National colors and emblems. While all Eureka vehicles were registered in Virginia, at least some were registered in other states as well and carried license plates of both Virginia and other states.

The claimant's accident occurred while he was operating a van for his employer, Eureka, as agent for National. The shipments he carried were recorded on a National trip manifest. On this trip, shipments were picked up in Virginia, the District of Columbia and Maryland for delivery in New Jersey, Connecticut and New York. The one shipment picked up in the District of Columbia had been delivered in New York City on the day before the accident.

Eureka's workmen's compensation insurance policy, written by Maryland Casualty Company (hereafter, Maryland Casualty), provided benefits under Virginia law only, regardless of where an injury occurred. A clause of the agreement between Eureka and National provided that the responsibility to furnish workmen's compensation insurance would lie with Eureka.

National was notified of the claimant's accident within an hour of its occurrence. Eureka, in turn was notified by National shortly thereafter. The claimant's father, who was President of Eureka, filed an accident report in his son's behalf with the Virginia Industrial Commission on February 22, 1966. At the same time, with assistance from Maryland Casualty's agent, he filed a compensation benefits claim with that carrier. On March 8, 1966, the claimant's father executed an agreement between his own company, Eureka, and Maryland Casualty, awarding the claimant $39.00 a week based on an average weekly wage of $110.00, until terminated in compliance with the Virginia law. The Virginia Industrial Commission approved this agreement on March 30, 1966. The claimant did not sign the compensation agreement, nor did he sign authorization for anyone to act in his behalf. His father acted for him, apparently without formal permission. However, the claimant did accept benefits for four hundred weeks and

medical expense payments for two years, the maxima provided by the Virginia statute in effect at that time.

A claim was filed by the claimant's father under New York State's compensation law for the benefit of the claimant. However, a decision was rendered on August 9, 1966, by the Workmen's Compensation Board of New York, closing the case. " . . . without prejudice, due to failure to prosecute". No subsequent claim has been filed in New York.

The claimant personally filed a claim for compensation under the Act, against Eureka, on May 2, 1972. This claim for permanent total disability gave rise to this case. No written claim has ever been filed against National and its carrier, Transport, directly. However, National was invited to appear at the informal hearing before the deputy commissioner. National and Transport were represented by counsel and did participate at the informal hearing and at the formal hearing before the administrative law judge. It is clear that the claimant is asserting a claim against National.

The administrative law judge in his original Decision and Order concluded that claimant was not covered by the Act at the time of the injury, and the claim was barred by the statute of limitations. The Board (with one member dissenting) reversed the administrative law judge's holding on both points, and remanded the case to the administrative law judge "for entry of an Order in favor of the claimant against the appropriate parties for compensation for permanent total disability in accordance with the Act."

The administrative law judge in his Supplemental Decision and Order on remand, after disputing the Board's conclusion that claimant was covered under the Act and was not time barred, went on to enter an Order against the employer, Eureka Van & Storage Company, and James A. Riley, Senior, personally, in that Riley had as

president of the company failed to secure the payment of compensation pursuant to Section 38 of the Act, 33 U.S.C. § 938. The administrative law judge also held National Van Lines and Transport Indemnity Company responsible for benefits pursuant to Section 4 of the Act, 33 U.S.C. § 904, which provides that a contractor is liable for, and shall secure the payment of, compensation to the employee of a subcontractor if the subcontractor failed to secure the compensation.

National Van Lines and Transport Indemnity Company have appealed contending that claimant is barred by the statute of limitations, that claimant is not covered by the Act, that National Van Lines is not liable under Section 4, and that Maryland Casualty Company is liable for compensation pursuant to Section 35 of Act, 33 U.S.C. § 935. The claimant also argues that Maryland Casualty Company should be held liable. Both the claimant and Director, Office of Workers' Compensation Program, contend that the administrative law judge exceeded his scope of authority when he made further findings of fact and further analysis of the jurisdictional and timeliness issues in his Supplemental Decision and Order. They also contend that the administrative law judge erred in failing to award claimant reimbursement for his self-procured medical supplies and attendant care pursuant to Section 7 of the Act, 33 U.S.C. § 907.

The Board will not consider National Van Lines' contention that claimant is not covered under the Act, and that claimant did not timely file. These issues were decided by the Board in its prior decision and the Board will not reconsider the matter. Moreover, the Board vacates those parts of the administrative law judge's Supplemental Decision and Order addressing the questions of coverage of the Act and the timeliness of the claim.

The Board does not agree with claimant's and National Van Lines' contention that Maryland Casualty Company

should be held liable for the payment of compensation, under Section 35 of the Act. Section 35 applies only if the insurer issued a policy under the Act. *See* 33 U.S.C. § 936 (a). From the record, it appears that Maryland Casualty only insured employer under the Virginia workmen's compensation law, and not under the Act. Moreover, it is not the province of the Board to bind Maryland Casualty under Section 35 through some form of estoppel argument, centering on its obligations to fully inform a potential purchaser of the varying forms of insurance the purchaser might need.

However, the Board is also convinced that National Van Lines is not liable for compensation under Section 4. Under prior case law, Section 4 has been applied in cases where a contractor entered into a contract with a third party to perform a service. The contractor then delegated its duties to the subcontractor. As a general rule, the subcontractor is responsible for the workmen's compensation claims of its employees. Section 4 provides a limited exception, making a contractor liable for the compensation claims of the subcontractor's employees if the subcontractor was uninsured.

The relationship of National Van Lines and Eureka Van Lines the Board concludes, is not the contractor-subcontractor relationship contemplated by Section 4. We agree with National Van Lines that Eureka was acting under an independent agency or contractor agreement, and that National Van Lines is not liable to the employees of Eureka.

Therefore, Eureka Van Lines, Inc. is responsible for the payment of benefits under the Act. However, the record discloses that Eureka Van Lines, Inc., is no longer in business, and is not insured for the payment of benefits under the Act. Accordingly, James A. Riley, II, as president of Eureka Van Lines, Inc., is personally liable for such compensation under the Act because of his failure to secure

payment of compensation under Section 32 of the Act, 33 U.S.C. § 932. *See* 33 U.S.C. § 938. If James A. Riley, II, is unable to provide these benefits, the Special Fund, established by 33 U.S.C. § 944, will be responsible for the payment of benefits pursuant to Section 18(b) of the Act. 33 U.S.C. § 918(b).

The administrative law judge in his Supplemental Decision and Order also held that claimant was entitled to reimbursement for the reasonable medical expenses incurred by him. However, this administrative law judge added that if the parties could not agree on the reasonableness of these expenses they would have to follow the procedures set forth in the Act and Regulations concerning a dispute as to the reasonableness of medical expenses. Inasmuch as the claimant at the hearing stated what these medical expenses were, and inasmuch as employer/carrier at that time made no exception whatsoever, we agree with the Director that the administrative law judge should have awarded claimant reimbursement for these medical expenses and Order.

Accordingly, the board vacates that portion of the administrative law judge's Supplemental Decision and Order wherein he found National Van Lines and Transport Indemnity Company responsible for payment of benefits under the Act. The Board also modifies the administrative law judge's Supplemental Decision and Order to provide that claimant is to be reimbursed for those medical expenses which he detailed at the hearing. The remainder of the administrative law judge's Supplemental Decision and Order is affirmed.

/s/ JULIUS MILLER
Julius Miller, *Member*

SMITH, Chairman, Concurring:

While I agree fully with my colleague's opinion and result in this appeal, I must point out that I express no opin-

ion on the Board's original determination of jurisdiction on the facts of this case. *Riley v. National Van Lines, Inc.*, 1 BRBS 449, BRB No. 74-155 (May 6, 1975). I agree with my colleague that since the issue of jurisdiction has previously been fully argued and determined by this Board, the Board should not permit the issue to be relitigated.

/s/ SAMUEL J. SMITH
Samuel J. Smith, *Chairman*

Dated this 23rd day of January, 1978

APPENDIX E

U.S. DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD

Washington, D.C. 20210

JAMES A. RILEY, III, *Claimant-Petitioner*

v.

EUREKA VAN AND STORAGE COMPANY
and
MARYLAND CASUALTY COMPANY
and
NATIONAL VAN LINES, INC.
and
TRANSPORT INDEMNITY COMPANY,
Employers/Carriers-Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *Petitioner*

v.

EUREKA VAN AND STORAGE COMPANY
and
MARYLAND CASUALTY COMPANY
and
NATIONAL VAN LINES, INC.
and
TRANSPORT INDEMNITY COMPANY
Employers/Carriers-Respondents

BRB Nos. 74-155 and 74-155A

DECISION

Filed as Part of the Record May 6, 1975

Appeals from Decision and Order of John I. Nevin, Administrative Law Judge, United States Department of Labor.

Walter W. Pitsenberger (Gelb and Pitsenberger), Washington, D. C., for claimant.

M. S. Mazzuchi, Washington, D. C., for employer, Eureka Van and Storage Company and carrier, Maryland Casuaity Company.

Leo A. Roth, Jr., Washington, D. C., for employer, National Van Lines and carrier, Transport Indemnity Company.

Joshua T. Gillelan, II, (William J. Kilberg, Solicitor of Labor; Marshall H. Harris, Associate Solicitor), Washington, D. C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

These appeals by the claimant and by the Director, Office of Workers' Compensation Programs, seek review and reversal of a decision and order (73-DCWC-86) of Administrative Law Judge John I. Nevin. The claimant was denied compensation for permanent total disability. The claim in question was filed pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et seq.*, as made applicable to employment in the District of Columbia by the District of Columbia's Compensation Act, 36 D.C. Code § 501 *et seq.* (hereafter referred to as the Act).

The claimant was employed as a truck driver by Eureka Van and Storage Company (hereafter, Eureka). On January 7, 1966, in the course of his employment, he was involved in an accident at Grand Island, New York. He sustained fractures of the fourth and fifth cervical vertebrae with complete transection of the spinal cord. As a result of this injury, the claimant is a quadriplegic, confined to a wheelchair.

At the time of the accident, Eureka was a Delaware corporation with its principal place of business in Fairfax County, Virginia. Eureka also maintained an office in the District of Columbia for telephone answering services. As a local carrier, Eureka operated in the Washington, D. C., commercial zone, which embraced Northern Virginia, suburban Maryland and the District of Columbia. As an agent of National Van Lines, Inc. (hereafter, National), Eureka was authorized to move shipments in interstate commerce, using the motor carrier license number issued to National by the Interstate Commerce Commission. Pursuant to the "Sales, Service and Hauling Agreement" in effect between the companies, all Eureka vehicles displayed National colors and emblems. While all Eureka vehicles were registered in Virginia, at least some were registered in other states as well and carried license plates of both Virginia and other states.

The claimant's accident occurred while he was operating a van for his employer, Eureka, as agent for National. The shipments he carried were recorded on a National trip manifest. On this trip, shipments were picked up in Virginia, the District of Columbia and Maryland for delivery in New Jersey, Connecticut and New York. The one shipment picked up in the District of Columbia had been delivered in New York City on the day before the accident.

Eureka's workmen's compensation insurance policy, written by Maryland Casualty Company (hereafter, Maryland Casualty), provided benefits under Virginia law only, re-

gardless of where an injury occurred. A clause of the agreement between Eureka and National provided that the responsibility to furnish workmen's compensation insurance would lie with Eureka.

National was notified of the claimant's accident within an hour of its occurrence. Eureka, in turn was notified by National shortly thereafter. The claimant's father, who was President of Eureka, filed an accident report in his son's behalf with the Virginia Industrial Commission on February 22, 1966. At the same time, with assistance from Maryland Casualty's agent, he filed a compensation benefits claim with that carrier. On March 8, 1966, the claimant's father executed an agreement between his own company, Eureka, and Maryland Casualty, awarding the claimant $39.00 a week, based on an average weekly wage of $110.00, until terminated in compliance with the Virginia law. The Virginia Industrial Commission approved this agreement on March 30, 1966. The claimant did not sign the compensation agreement, nor did he sign authorization for anyone to act in his behalf. His father acted for him, apparently without formal permission. However, the claimant did accept benefits for four hundred weeks and medical expense payments for two years, the maxima provided by the Virginia statute in effect at that time.

A claim was filed by the claimant's father under New York State's compensation law for the benefit of the claimant. However, a decision was rendered on August 9, 1966, by the Workmen's Compensation Board of New York, closing the case, " . . . without prejudice, due to failure to prosecute." No subsequent claim has been filed in New York.

The claimant personally filed a claim for compensation under the Act, against Eureka, on May 2, 1972. This claim for permanent total disability gave rise to this case. No written claim has ever been filed against National and its carrier, Transport Indemnity Company (hereafter, Transport), directly. However, National was invited to appear at the informal hearing before the deputy commissioner. National and Transport were represented by counsel and did participate at the informal hearing and at the formal hearing before the administrative law judge. It is clear that the claimant is asserting a claim against National.

The administrative law judge considered two issues in this case. First, is this claim within the jurisdiction of the Act? Secondly, is the action barred by failure to timely file a claim? The administrative law judge resolved both of these issues against the claimant and "dismissed" the claim because of lack of jurisdiction to apply the Act and because of failure to file within one year of the date of injury. Both the claimant and the Director, Office of Workers' Compensation Programs, appeal this Decision.

We proceed first to consider whether the claim asserted here, considering the employment relationship which was in effect at the time of the claimant's injury, is properly within the jurisdiction of the Act.

In a recent decision, adjudicating appeals from an award of death benefits to the survivors of an employee who was killed in the course of his employment in California, the Board reviewed the coverage provision of the Act and its extraterritorial application. *Ekar* v. *International Union of Operating Engineers,* 1 BRBS 406, BRB Nos. 74-209, 209A (April 11, 1975). In affirming the award of benefits in that case, we found that the protection of the Act may be extended to a claimant when it is shown that the District of Columbia has sufficient legitimate interest in an employment-related injury or death to permit application of the Act. Sufficient legitimate interest is predicated upon showing some substantial contact between the employer-employee relationship and the District of Columbia. The first issue to consider in the instant case, then, is whether or not the District of Columbia has sufficient legitimate interest in Riley's accident to warrant application of the Act to his claim for compensation for permanent total disability.

The record indicates that activities pursuant to the employment relationship between Riley and Eureka were carried out in the District of Columbia regularly over a period of years. Eureka's area of operations as a local carrier was metropolitan Washington, D.C. There is uncontradicted testimony that the claimant entered the District of Columbia in performance of Eureka's business once or twice a week for five years preceding his accident. During the trip which culminated in his accident and injury, the claimant picked up one shipment in the District of Columbia and delivered it in New York City on the day before the accident. Thus, this final trip itself bore a relationship to the District of Columbia. Finally, Eureka's President, the claimant's father, admitted that he operated a place of business in the District of Columbia—an office maintained for telephone answering services.

In the judgment of this Board, there is substantial contact between the employer-employee relationship and the District of Columbia in this case which is sufficient in degree to permit application of the Act to Riley's claim. We hold that the administrative law judge incorrectly "dismissed" this claim because of lack of jurisdiction to apply the Act.

The second issue to be resolved in these appeals concerns timeliness of filing the claim. The administrative law judge found that this claim is barred by Riley's failure to file it within one year of the date of injury, as prescribed by Section 13(a) of the Act, 33 U.S.C. § 913(a). However, Section 30(a) requires the employer to file a report with respect to an injury with the Secretary of Labor and with the deputy commissioner of the district within which the injury occurred, within ten days from the date of the injury; Section 30(f) tolls the statute of limitations in Section 13(a) where the employer or carrier, having notice or knowledge of the injury, fails, neglects or refuses to file the required report. 33 U.S.C. §§ 913(a), 930(a), 930(f). There is no question that the employer had notice of the claimant's injury within a few hours of its occurrence.

Since no report of injury was filed with the Secretary or the deputy commissioner, the statute of limitations did not begin to run against Riley's claim. Therefore, the claim filed under the Act on May 2, 1972, more than five years after the accident, is timely. *Cain* v. *Fort Lee Officers' Open Mess*, 1 BRBS 372, BRB No. 74-194 (March 31, 1975); *Associated Indemnity Corporation* v. *Shea*, 455 F.2d 913 (5th Cir. 1972); *Travelers Insurance Company* v. *Adler*, 230 F.Supp. 593 (D.D.C. 1964).

Since the administrative law judge failed to apply Sections 30(a) and (f) of the Act in determining whether or not this claim was timely filed, his conclusion that Riley's claim is barred by the statute of limitations is erroneous.

The Board, therefore, remands this case to the administrative law judge for entry of an Order in favor of the claimant against the appropriate parties for compensation for permanent total disability in accordance with the Act.

/s/ RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

I Concur:

/s/ JULIUS MILLER
Julius Miller, Member

Hartman, Member, dissenting:

I respectfully dissent from the majority opinion in this case.

Although I would not deny this claim on the issue of timeliness, I cannot agree that the record before this Board permits, let alone requires, reversal of the Decision of the administrative law judge on the issue of jurisdiction.

Section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3), and the law as summarized in *O'Keeffe* v. *Smith Associates*, 380 U.S. 359 (1965), require the Board to affirm a decision when that decision is supported by substantial evidence, is not irrational, and is in accordance with law.

In our recent Decision in *Ekar* v. *International Union of Operating Engineers*, 1 BRBS 406, BRB Nos. 74-209, 209A (April 11, 1975), the Board expressed the view that extraterritorial application of the Act is permissible if it can be shown that there are substantial contacts between the District of Columbia and an employer-employee relationship, such that the District of Columbia has sufficient legitimate interest in that relationship to warrant application of the Act. The Board's interpretation of the extraterritorial extension provision of the Act was founded principally on analysis of the Supreme Court decision in *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947). At the time of writing his Decision in the present case, the administrative law judge did not have the benefit of the Board's guidance as expressed in *Ekar, supra*. However, he did evaluate the record evidence before him in light of his own analysis of the concepts of "substantial contacts" and "legitimate interest of the District of Columbia" as they are discussed in the *Cardillo* opinion. In denying this claim for compensation for permanent total disability, the administrative law judge found that there is no substantial connection between the District of Columbia and the employer-employee relationship in this case, so that substantial

interest on the part of the District of Columbia is absent. I believe this Board is bound to accept that conclusion. The Decision of the administrative law judge is clearly supported by substantial evidence.

The claimant was a resident of Virginia, hired in Virginia, employed by an employer whose place of business was in Virginia. He was paid in Virginia and was covered by workmen's compensation insurance in accordance with Virginia law. By virtue of his occupation as a driver of a long distance moving van, the claimant had transitory relationships with many states and the District of Columbia. However, his base of operations remained Virginia.

During the trip which culminated in his accident and injury, the claimant did pick up one shipment in the District and delivered it in New York City. However, he also made at least three pick ups in Virginia and two in Maryland on this same trip. At the time of the accident and injury in New York, the shipment from the District of Columbia had been delivered. If the District had any interest in the claimant's employment, it had already been extinguished.

The claimant testified that he had visited the District on behalf of Eureka once or twice a week during a period of about five years prior to his accident. However, the record indicates that these visits were merely temporary contacts of short duration. In my opinion, this record supports the conclusion that such contacts are not sufficient to bring the claimant within the ambit of the Act for compensation for an injury incurred in the course of employment other than in the District of Columbia. If the injury had been sustained in the District, the interest of the District would have been different and the claimant would certainly be entitled to claim benefits under the Act. However, the injury here was sustained in New York by a Virginia resident employed by a Virginia employer.

The record before this Board is unclear as to whether or not the claimant's employer actually maintained a place of

business in the District of Columbia. Did Eureka merely subscribe to a telephone answering service in the District, or did the employer have an office with resident employees who solicited and accepted business in the District of Columbia? In my opinion, this record supports the conclusion that Eureka was not an employer within the meaning of the Act, and thus was not subject to the jurisdiction of the Act.

Determination of whether or not the Act may be applied to a claim for compensation is a jurisdictional question. However, when an issue of jurisdiction turns on questions of fact, the determination of the administrative law judge is conclusive if supported by record evidence. *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U.S. 251 (1940). Moreover, if it is supported by evidence and not inconsistent with law, an inference drawn by an administrative law judge is conclusive, even where such inference is more legal than factual, when it is evident that the fact-finder's choice is firmly based on record evidence and is not forbidden by law. *Cardillo, supra.* This Board has expressed the view that the coverage provision of the Act, including its extra-territorial application, is so imprecise as to be susceptible of more than one interpretation. *Ekar, supra.* Therefore, the inference that there is no substantial connection between the District of Columbia and the employer-employee relationship in this case such that substantial interest on the part of the District of Columbia is absent, is certainly not forbidden by law. The conclusion that this claim is not within the jurisdiction of the Act is entirely reasonable and supported by substantial evidence.

Therefore, I would affirm the administrative law judge in his denial of compensation because of lack of jurisdiction to apply the Act.

/s/ Ralph M. Hartman
Ralph M. Hartman, Member

Dated in Washington, D.C. this 6th day of May 1975

APPENDIX F

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Washington, D.C. 20210

Case No. 73-DCWC-86

(Formerly 69461)

In the Matter of

James A. Riley, III, *Claimant*

v.

Eureka Van and Storage Company, and
Maryland Casualty Company, *Employer and Carrier*

National Van Lines, Inc. and
Transport Indemnity Company, *Employer and Carrier*

Walter W. Pitsenberger, Esq.
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

For the Claimant

M. S. Mazzuchi, Esq.
405 Investment Building
1511 K Street, N.W.
Washington, D.C. 20005

For Maryland Casualty
Company and Eureka Van
and Storage Company

Leo Roth, Jr., Esq.
1314 - 19th Street, N.W.
Washington, D.C. 20036

For National Van Lines, Inc.
and Transport Indemnity Company

Before: JOHN I. NEVIN
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, and the District of Columbia Compensation Act, 36 D.C. Code 501, and the Rules and Regulations implementing said statutes, 20 CFR Parts 701 and 702, a hearing in the above-captioned matter was held before me on January 20, 1974, in Washington, D.C. All parties were represented by counsel and afforded full opportunity to adduce evidence and to call, examine and cross-examine witnesses. Thereafter the parties submitted briefs which have been duly considered.

The basic issues raised at the hearing and argued in the briefs are whether these claims are within the jurisdiction of the District of Columbia Workmen's Compensation Act; and whether they are barred by failure to assert them within the time prescribed. Inherent in these are subordinate issues concerning the liability of Maryland Casualty Company and National Van Lines in the District through the Employer, Eureka.

Findings of Fact

1. James A. Riley, II, hereinafter referred to as Riley, Senior, was both the father of Claimant and the sole stockholder and President of Eureka Van and Storage Company, Inc. (Tr. 169-74; ALJ-9). Eureka's principal place of business was in Fairfax County, Virginia. Its principal service area was the Washington Metropolitan area (ALJ-9; Tr. 93-94). Eureka became a corporation, as distinguished from a sole proprietorship prior to the accident (Tr. 169). All of the hiring, direction, control and discharge of Eureka's employees, including Claimant, was performed by Riley,

Senior as President of the corporation (Tr. 128-31, 192-95). Eureka owned, paid for and maintained the nine vehicles operated by it. They were all registered in Virginia, but carried other license tags as well (Tr. 104).

2. Eureka did not have an ICC Motor Carrier's license number of its own. When it moved shipments in interstate commerce it did so pursuant to an agreement with National by which it used National's ICC Motor Carrier's number (Tr. 149, 167, 169-72; Cl. Exh. 2; Tr. 173, 187). Eureka vehicles displayed colors and emblems of National pursuant to the agreement (Cl .Exh. 2; Tr. 70-71, 103-06, 169-73).

3. The contract with National Van Lines was a written agreement dated August 10, 1961, between National and Riley, Senior, signing as owner of Eureka Van and Storage Company. This agreement, titled an "Agency Agreement," provided in essence that the agent, Eureka, was to solicit orders for National's services and accept orders in the name of National for execution in accordance with company policy (Act I). The agent further agreed to advertise and promote National's name in conjunction with its own, all in accordance with a company manual entitled "Agent Guide" which was to be used as a guide in the discharge of normal business (Act III). National agreed to provide designs and color schemes for use by Agent (in decorating its vehicles) subject only to the proviso that such use should not indicate that the Agent was a "general" agent (IV B, Supp. II).

The agreement was to be construed in accordance with the laws of Illinois and the United States and was not to create an employer-employee relationship between National and the Agent or its employees (Act V). The agent was to hire, supervise, pay, control and discharge its own employees and pay such taxes arising out of their employment directly (VIII A).

As a condition precedent to operation of agent's vehicles in the service of National, the agent was to have obtained

the required workmen's compensation and other insurance as provided in the insurance clause (Supp. I-B). The insurance clause provided, inter alia, that the agent was to supply workmen's compensation insurance and employees liability insurance on individuals which the agent employs for interstate moving services during the term of the agreement (Supp. III-C; Cl. Exh. 2; ALJ-9).

This agreement remained in effect continuously through the date of the accident and was the agreement in effect on that date (Tr. 200-205, 207-208; ALJ-9).

4. The modus operandi of National and Eureka under their contracts was as follows:

> Eureka was one of several National agents in the Washington area. An agent would contact a shipper and obtain freight pick-up information. He would also contact National to provide the necessary vehicle at the desired pick-up time. The driver would pick up the shipment (Tr. 135, 206-07). At the same time the agent would provide the desired delivery time from the shipper (Tr. 135). The driver would report the delivery when made (Tr. 131-33).
>
> Co-ordination was provided by a National employed dispatcher. He would frequently offer additional shipments going in a general direction to a driver already bound in that direction, giving the driver the desired information as to pick-up and delivery. The driver was not obliged to accept the order from the dispatcher. In Eureka's case the driver could and did consult Eureka (Riley, Senior) as to whether to accept on the basis of profitability (Tr. 152-160, 163-65, 193, 206-07).
>
> Eureka could and did make shipments on its own, as well as on behalf of National, but when they moved in interstate commerce they moved in National's name (Tr. 136, 167).

> No direction was given by National as to the route to be traveled from point to point (Tr. 132).
>
> Eureka drivers, including Claimant, attended a training course at Broadview, Illinois sponsored by National Van Lines in which methods of record-keeping, preparation of Bills of Lading, etc. were taught. The purpose of the course was to teach the drivers how to comply with the required ICC regulations pertaining to shipments moving in interstate commerce, in pursuance of the agreement with National (Tr. 155-56, 160-62, 193-94). Successful completion of the course was necessary to National's approval of the individual as a driver. Lack of approval prohibited the driver from hauling National shipments. It did not prevent the driver from handling Eureka shipments within Virginia (Tr. 155-56, 193-94).

5. In 1963, witness Nicholas Castellano was an independent insurance agent employed by the O'Shaughnessy Insurance Agency. He placed business with several companies including Maryland Casualty Company.

On or about August or September 1963, Castellano first met Riley, Senior. Prior to that time Eureka's operation had been covered by Maryland Casualty and continued to be so covered insofar as workmen's compensation was concerned. He discussed with Riley, Senior, the nature of Riley's operations. He stated that Riley, Senior told him that his operations were in Northern Virginia only and that the liability on vehicles and men outside of Virginia was covered by a contract he had with the "Van" lines. The discussion included the amount of premiums to be charged (Tr. 51-52, 56-58, 68-70; Tr. II.—25).

Riley, Senior testified that he did not remember the conversation related by Castellano but states he was told by Castellano that all he needed was coverage under Virginia laws (Tr. 175-76, 186-187, Tr. II. 27-28).

Castellano delivered the renewal policies to Eureka in Virginia (Tr. 52, 54).

The Declaration Section of Policy No. 01-82-27-81 issued by Maryland Casualty Company covering the period from October 10, 1965 to October 10, 1966, was issued to Eureka Van and Storage Company, Inc. as a renewal of Policy No. 01-769112. The street address of the insured was in Falls Church, Virginia, later changed to Merrifield, Virginia. The policy provided that:

> "All usual work places of the insured at or from which operations covered by this policy are conducted are located at the above address unless otherwise stated."

It further specifically provided that:

> "Coverage A of this policy applies to the workmen's compensation law and any occupational disease law of each of the following States: Virginia." (Tr. 21-22, 211; Eureka Exh. 1).

In addition to the Declaration Section of the policy, there is a cover jacket containing the general provisions. These provisions revised as of August 1963, were in use in all States and the District of Columbia (Tr. 75; Eureka Exh. 6; Tr. 224, 229; Tr. II.—10). These two portions constituted the complete contract which showed on its face that it covered Virginia operations only (Tr. 231-32, ALJ-9).

6. There was also available, through Maryland Casualty, an "all states" compensation clause that could have been added, by endorsement of the policy, the effect of which was to provide coverage all over the Continental United States (Tr. 80-81). No such coverage was applied for in this case. Riley, Senior stated he only wanted Virginia coverage (Tr. 82-83).

The coverage on a policy had a direct bearing on the premium to be paid. Riley, Senior's policy covered only Virginia (Tr. 82). The fiscal premium is figured by the

Carrier, Maryland, on the basis of the payroll submitted by the agent and the rate for the State concerned (Tr. 88-89).

In computing premiums for multiple coverage in more than one State the form used is the same but the payroll and category of employment in each State is allocated and set forth so that the policy holder knows from the face of the policy what coverage, by State, he has and what he is paying for it in premiums (Tr. 90).

7. Riley, Senior, admitted that he received and read the policy about thirty days after it was written. He noted the Virginia coverage only. He does not remember if he questioned it. He admits that the policy was never changed (Tr. 177, Tr. II—34). It was stipulated that the Virginia policy covered claims occurring anywhere in the Continental United States in accordance with Virginia Law and at Virginia rates of benefit.

8. James A. Riley, III, who is herein before and after referred to as the Claimant, stated he was born in 1943 (November 19); he is now unemployed and has been so since January 7, 1966, the date of the accident (Tr. 93). The accident occurred at Grand Island, New York, a suburb of Buffalo (Tr. 93). The truck driven by Claimant "jackknifed" on an icy road and struck an abutment (Tr. 93).

At the time of the accident and for five years earlier, Claimant had been employed by the Employer, Eureka, as a truck driver (Tr. 93, 128-31). He had been so employed at the time Eureka was incorporated (Tr. 93-94).

The particular truck involved in the accident was a 1965, GMC Tractor, bearing New York, as well as, Virginia tags (Tr. 104). The trailer had only Virginia license tags (Tr. 104). The unit was owned by Eureka and had National Van Lines markings (Tr. 65-66, 69, 104).

The trip on which the accident occurred is recorded on a National Van Lines trip manifest form which shows the

Bill of Lading number, shipper's name, origin, destination, loading date, estimated time of arrival, cubic feet and type of shipment (National or COD). This trip was Number 151, Manifest No. N474, showing Eureka as the agent and J. Riley as the driver. The manifest date was January 5, 1966 (Tr. 29, Cl. Exh. 1). Item 2 on the manifest originated in the District of Columbia and was picked up on December 30, 1965. It had been delivered in New York City one day before the accident (Tr. 96-97).

The Claimant stated he had visited the District of Columbia on company business once or twice a week for five years prior to the accident (Tr. 94).

9. Claimant made no reports himself to National, Eureka or anyone else on the date of the accident because he was incapable of doing so (Tr. 138-42, 148). Riley, Senior first received word of the accident through the National Van Lines dispatcher at Broadview, Illinois shortly after the accident (Tr. 18).

10. An "Employer's First Report of Accident" was filed by Riley, Senior as President of Eureka Van and Storage Company, Inc. before the Industrial Commission of Virginia, on February 22, 1966. It recited that the Employer's place of business was in Merrifield, Virginia; that the accident occurred at Grand Island, New York on January 7, 1966 at 10:30 A.M.; and that the foreman, James A. Riley, was aware of the accident by 11:30 A.M. of that same day. The injured man was described as the Claimant, James A. Riley, III, of Fairfax, Virginia, 22 years old, whose regular occupation was that of a truck driver for the corporation at a salary of $110.00 per week for a six day week. The accident occurred when the tractor truck driven by the injured employee jackknifed (Tr. 23-25; Eureka Exh. 2). The form was filled out and signed in Eureka's office by Riley, Senior in the presence of an accountant and Castellano. Castellano forwarded the claim to

Maryland Casualty at their Branch Office in Wheaton Plaza, Montgomery County, Maryland (Tr. 71-77; Eureka Exh. 2).

11. On March 8, 1966 an agreement as to compensation was executed on behalf of the Employee, James A. Riley, III, by his father, Riley, Senior, signing as attorney in fact; the Employer, Eureka Van and Storage Company, Inc. (with no particular signature on its behalf), and Maryland Casualty Company, by an adjuster. The signature of Riley, Senior was witnessed by N. R. Castellano of 220 Balsam Road, Sterling, Virginia. This agreement recited that the Claimant should receive $39.00 per week (based on an average weekly salary of $110.00) from January 14, 1966 until terminated in accordance with the provisions of the Workmen's Compensation Law of the State of Virginia. The basis for the agreement was compensation for the injury received on January 7, 1966 (Tr. 23-25; Eureka Exh. 5, 188-190). He stated he signed the agreement in the best interest of his son and deposited the benefits to his son's account (Tr. 188-190).

12. By Notice of Award dated March 30, 1966, the Virginia Industrial Commission approved the settlement agreement calling for payment of $39.00 per week compensation under the Virginia Act. The final paragraph states pertinently:

> "If any party in interest doubts that the agreement made has been made strictly according to law, he may address the Commission with an inquiry, or complaint." (Tr. 23-25; Eureka Exh. 4).

Claimant started to receive benefits from Maryland Casualty at the rate of $39.00 per week for 400 weeks or until about two months before this hearing, i.e., October 1973. The total amount paid in compensation was $15,600.00. In addition, Maryland Casualty paid the hospital and medical bills for the first two years. These medical benefits terminated on January 7, 1968 (Tr. 110-111, 116). Maryland

Casualty has discharged its obligation under Virginia Law (Tr. 116-117). No further claim is now made pursuant to Virginia Law (Tr. 117; ALJ-9).

13. Claimant had never been to Virginia after the accident and prior to April 1966 to participate in hearings before the Industrial Commission (Tr. 106). He did not sign the compensation agreement (Tr. 106; Eureka Exh. 3). He never signed any written authorization for anyone to act on his behalf (Tr. 108).

Claimant stated that he enjoyed a usual happy father and son relationship with Riley, Senior and that during his six months hospitalization in New York his father visited him often (Tr. 118-120). During this period, he assumed his father was handling his business affairs, although he didn't ask him not to do so (Tr. 120). He states he never saw any checks personally but assumed they were deposited to his account (Tr. 120, 188-190). He never objected to his father acting on his behalf (Tr. 199).

Claimant became aware, after he was released from the New York hospital and returned to Virginia, that he was receiving checks from the Maryland Casualty Company pursuant to the Virginia Statute (Tr. 124). He discussed with his father the fact that the insurance company was paying for the accident and was told he was entitled to the payments (Tr. 124-26).

About eight to ten weeks elapsed from the date of the accident and the resumption of the son's ability to discuss his affairs with his father (Tr. 197). This would have been about April or May 1966.

14. An action was filed by Riley, Senior under the New York State Compensation Law (Tr. 29-31, 184-86; Nat. Exh. 1). This action was not prosecuted by Claimant because it was shown in New York that there has been Virginia coverage only and that an award had already been made (Tr. 34-35; Opening statement of counsel for Claim-

ant). It was dismissed without prejudice on August 9, 1966 (Nat. Exh. 1).

Claimant states he never saw the paper from the State of New York until the date of the hearing (Tr. 121). He never personally filed a claim in New York (Tr. 122; Nat. Exh. 1). Neither did he ever retain counsel in New York (Tr. 122).

15. Claimant had consulted a Washington attorney about a year prior to March 22, 1972 (March 22, 1971), which was the date he retained his present counsel (Tr. 122-24). He stated that the subject of discussion at that time was the possibility of filing additional claims in New York State.

16. An Employee's Claim for Compensation dated May 2, 1972, and signed by James A. Riley, III was filed with the Deputy Commissioner. It recited Claimant was born in November, 1943; that he suffered an accident at 11:00 A.M. on January 7, 1966; that his average weekly wage at the time was $125.00 and his annual salary was $6,500.00. It named as his foreman, "Dispatcher, National Van Lines, Broadview, Illinois." It was stated that the dispatcher knew of the accident on the same day as it occurred. It further stated the accident had occurred in New York State at Grand Island, New York. It also said that Claimant had never returned to work after the accident and was permanently confined to a wheelchair as a result thereof (ALJ-6). The answer of Respondents, Maryland Casualty and Eureka, filed by the Carrier, admitted all allegations except that the Employee and Employer were subject to the Act at the time of the injury (ALJ-8).

17. The Claimant never filed a claim against National similar to that addressed to Eureka and its Carrier in 1972 (ALJ-6; Tr. 137-38). However, Claimant is now asserting a claim against National as well as Eureka (Tr. 157).

18. The parties stipulated that the average weekly wage at the time of the injury was $110.00 (Tr. II.—4).

19. Claimant was totally and permanently injured, within the scope of his employment, as a result of the accident. He was hospitalized a total of two years, six months of which were in New York State (Tr. 105). He is a quadriplegic having no use of his four limbs except for limited ability to carry out self-care activities. He is confined to a wheelchair (Tr. 105, ALJ-7, 9).

20. Claimant states that since January 1968, he has incurred additional medical expenses. He was hospitalized at Cafritz Hospital for about six weeks and at Fairfax Hospital for about two weeks. The cost of each hospitalization was paid under his wife's insurance policy through the Washington Post. No amounts were stated (Tr. 111). The Claimant stated that on both occasions he was treated for "Decubiti", or bed sores, and urinary tract infections (Tr. 114). Claimant further states that since January 1968, he has expended from his own funds the following sums of money for medical attendance, supplies and equipment without reimbursement (Tr. 115-116).

Year	Attendant	Medicine and Equipment
1968	$6,500.00	$2,700.00
1969	$7,020.00	$2,900.00
1970	$7,540.00	$1,500.00
1971	$7,800.00	$3,515.00
1972	$8,060.00	$8,203.00
1973	$8,320.00	$3,500.00

Conclusions of Law

1. The testimony of Riley, Senior throughout the hearing was evasive, vague, and full of "I don't remember" answers to questions, the subject matter of which one could hardly fail to remember. For instance, he did not remember if he retained an attorney to represent him in New York; or if he had been appointed by anyone to represent his son's interest in New York; or if he had received a signed paper

appointing him his son's attorney-in-fact; or if a court appointed him (Tr. 182-90). We also note that although as the employer, he was nominally, an opposing party to the Claimant, in fact he conducted himself throughout the history of this claim as the naturally concerned and interested father of the injured Claimant. He was thus in a conflict of interest between his duty to the Corporation and his filial concern for his son. His testimony reflects that he resolved this conflict, not unnaturally, in favor of the Claimant. On the whole it is not sufficiently credible to constitute the substantial evidence upon which our decision must rest (*Richardson* vs. *Perales*, 402 U.S. 389 (1971).

2. Notwithstanding Riley, Senior's testimony to the contrary, we find that he knowingly and intentionally purchased workmen's compensation insurance in Virginia only; that he rejected coverage elsewhere; that he knew, or should have known, that the Virginia coverage was applicable country-wide and that he considered it to be a discharge of his contractual obligation to provide workmen's compensation insurance for drivers operating under the National agreement. We further find that Riley, Senior, as the Employer, did not refuse D.C. coverage because he was misled, or because he expected National to provide it, but because it was more expensive, and not necessary to satisfy the law of his domicile, (Virginia). To conclude otherwise would be to indulge in a presumption, unsupported by any contemporary evidence, that he not only intended to breech his contract with National by not providing the workmen's compensation insurance he was obliged to provide under that contract, but that he deliberately exposed himself to the criminal sanctions imposed on employers subject to the Act by failing to obtain D.C. coverage (see 33 U.S.C. § 938).

3. We further find, contrary to the argument in Claimant's brief, that there is no evidence that the corporate Employer, Eureka, through Riley, Senior, and Maryland

Casualty contrived to bring a compensation claim into a jurisdiction "selected" by them, nor did anything else amounting to fraud, deceit, or even innocent misrepresentation of facts that would justify treating the Virginia Award as other than final. Neither is there a basis for converting an "involuntary" payment into a "voluntary" one. The facts clearly show that Riley, Senior filed the claim in Virginia because it was the most logical place to file it. Both, Eureka, father and son, were residents of Virginia and the only insurance coverage was Virginia coverage provided in accordance with Virginia Law. Further, he undertook to act for his son out of parental concern, when his son was unable to act for himself. When the son became able to control his own interests, he ratified the cast that his father had taken on his behalf. The son accepted the benefits achieved through his father's actions continuously, over a substantial period of time, until they were exhausted. One who assumes a position in a legal proceeding and successfully maintains it is precluded from thereafter assuming an inconsistent position if it be to the prejudice of one who acquiesced in the position formerly held. Such is the rule in Virginia and in the federal courts [*Davis* vs. *Wakeslee,* 156 U.S. 680 cited in *Rhea* vs. *Shields,* 49 SE2 70 (1904); *McLaughlin* vs. *Gholson,* 171 SE2 816 (1970); *Davis* vs. *Wakeslee,* supra, cited in *Jones* vs. *Central Railway of Georgia,* 331 F2 649 (1964); *Roth* vs. *McAllister,* 316 F2 143 (1963). We think he is estopped to challenge that proceeding now, in what is, in effect, a collateral attack on a foreign judgment (only after it has been satisfied). If Claimant believed then, as he now alleges before us, that the Virginia Industrial Commission was induced to make an award on the basis of misrepresentation of facts before it, the fraud alleged was upon the Commission and this argument should have been addressed to it. Claimant failed to do so. His acquiescence in the result over a period of years creates a strong inference that it was, and is, proper.

4. Section 36-501 of the District of Columbia Code pertinently states:

> "§ 36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to District of Columbia.
>
> The provisions of Chapter 18 of title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of any employee of an employer carrying on any empoyment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat. 600, Ch. 612, § 1.)."

The treatment of jurisdiction in cases of this nature is largely a treatment of which statute applies, but the two concepts usually coincide since the compensation law of one jurisdiction cannot ordinarily be enforced in another (Larson: Workmen's Compensation Law, Sec. 84:20, hereinafter cited as Larson). A sound reason for this is because the purpose of a commission, as in Virginia, is to not only administer disputes and make money awards, but to supervise the contining beneficial application of the statute as needed.

5. The rule is that the full faith and credit clause of the United States Constitution applies to statutes as well as judgments, but the constitutional requirement is satisfied where the legitimate interest of the forum state is such that it may justifiably protect that interest by application of its own rule [Larson, Sec. 86; *Alaska Packers Assn.* vs. *Industrial Accident Commission,* 294 U.S. 532 (1935); *Pacific Employers Insurance Co.* vs. *Industrial Accident Commission,* 306 U.S. 493 (1939); *Cardillo* vs. *Liberty*

Mutual Insurance Company, 330 U.S. 469 (1947), 67 S.Ct. 801]. Where the local forum sits in the jurisdiction where the injury occurred, the contract of employment was made, the employment relation exists, the employee resides and where the business is localized, then the local compensation statute is applicable (Larson, Sec. 86). Where the injury occurs in another jurisdiction the local forum must decide whether it will apply its own statute. As an example, for Virginia to apply, as it did in this instance, its out-of-State rule, it requires the presence of four elements: the place of contract, the employer's business, the employee's residence, and a showing that the services were not to be rendered exclusively outside the State (Larson, Sec. 87:11 citing Virginia Code, Sec. 65-68).

The District of Columbia statute leaves delineation of the restrictions on its extra territorial application to the courts (Larson, Sec. 87:13, 36 D.C. Code 501). In the leading case in the District of Columbia [*Cardillo* vs. *Liberty Mutual Insurance Company,* 330 U.S. 469 (1947) the Supreme Court dealt with the application of the D.C. Statute as well as with the constitutional need to give full faith and credit to the Statute of Virginia. In that case, the employment contract was made in the District, the employer was in the District and the claimant was a resident of the District. The injury occurred in Virginia. It was contended that Virginia had sole jurisdiction over the claim. The Court held jurisdiction is to be presumed in the absence of substantial evidence to the contrary, citing Section 20 of the Longshoremen's Act, a provision which, it stated, applies with equal force under the D.C. Act and; jurisdiction rests upon the D.C. Act, the language of which leaves no room to exclude employees who have substantial business and personal connections in the District but who are injured outside the District. However, the Court further stated that whether this language covers employees who are more remotely related to the District is a matter which was not then decided. The opinion stated that the purpose

of the Act was to provide residents of the District with a remedy and District employers with a limited and determinate liability. To further this purpose, the District's interest in providing a remedy for its residents did not turn on the location of the injury, but on the existence of a substantial connection between the District and the particular employer-employee relationship which it found to exist in that case, and which existed in earlier holding of the Court of Appeals for the District of Columbia which were cited with approval. For instance, see *B.F. Goodrich* vs. *Britton,* 139 F2 362 (1943), where the employer and the employee resided in the District and the employer was engaged in business in the District, even though the accident occurred elsewhere; to the same effect see *Travelers Insurance Co.* vs. *Cardillo,* 141 F2 362 (1944); and, *Travelers Insurance Co.* vs. *Cardillo,* 141 F2 364 (1944). From these holdings it is apparent that a substantial connection between the employer-employee relationship and the District exists when both the employer and employee are residents, the contract of employment is made in the District and business is carried on in the District.

In a contemporaneous case the Court of Appeals for the District of Columbia held that where the injury was sustained in Maryland, the contract of employment was made in Maryland, and at the time of the injury no employment existed within the District of Columbia, and an award had already been made under the Maryland Compensation Law, the claimant even though a resident of the District of Columbia was not subject to the District of Columbia Act [*Gudmundson* vs. *Cardillo* (1942) 126 F2 521]. And, in *Travelers Insurance Co.* vs. *Cardillo,* supra, (141 F2 362), the Court by way of dictum stated that if the claimant had made and pursued his claim to final award in Maryland, it would have been final and conclusive in the District and elsewhere.

In the *Suburban Glass Co.* (*Suburban Glass Co.* vs. *Wood,* BRB 130-73, March 8, 1974) case the Benefits Review

Board found that the D.C. Statute contained no prerequisite that the employment contract arise in the District; that the employer maintain an office in the District, nor even that the injury occur in the District. The only requirement for jurisdiction is stated to be that the employer carry on employment in the District. In so holding it stated that the cases relied upon by the petitioner therein were not controlling in that none of them required the presence of any specific factor as necessary, [citing *Cardillo* vs. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 67 S.Ct. 901 (1947); *Pacific Employer's Insurance Co.* vs. *Industrial Accident Commission*, 306 U.S. 493, 59 S.Ct. 629 (1939); *Alaska Packers Association* vs. *Industrial Accident Commission*, 294 U.S. 532, 55 S.Ct. 518 (1935); *U.S. Fidelity Guaranty Co.* vs. *Donovan*, 221 F.2d 515 (1954)].

We do not find, as the Board did in *Suburban Glass*, that the Employer herein was carrying on employment in the District sufficient in degree to require the District to invoke its Act. In this case the Employer entered the District on an itinerant basis to make pick-ups or deliveries of merchandise enroute to or coming from other parts of the Country. On these trips as on the trip in which the accident occurred, the employer's vehicle passed through, perhaps without even stopping, several intermediate States to reach its destination. It can hardly be said that the mere passage through these States makes the employer liable under their respective workmen's compensation statutes. Yet, this is what Claimant would have us hold to be true of them and of the District of Columbia. Such is not the rule of reason. Logic and common sense hold us to a rule which gives practical effect to the real interest of the District of Columbia in the application of its statute. We can find none here. The Claimant was a Virginia resident. His contract of employment, to the extent that public policy made local law a part of the contract, incorporated Virginia Law. The employer's place of business was in Virginia and subject to Virginia Law. The accident occurred in New York. The

policy of the District Law as observed by the Court in *Cardillo* is to conserve and forward the interests of District residents while at the same time placing on District employers a limited and determinate liability. It does not purport to make every itinerant foreign employer, whose presence in the District at any particular time is vicarious and uncertain, a District employer whose liability is over and above that of its domicile when the foreign employer has already met all the obligations of its domicile. It would appear that as a matter of comity such a result would be negated. For this reason we believe that the local characteristics of the fact situation in *Suburban*, distinguish it from the case at bar. The employment in that case was greater in degree and more typical of a local situation. We do not feel that the principles of *Suburban* reaches as far as the case before us. To the contrary, giving effect to the presumption of jurisdiction referred to by the Court in *Cardillo*, supra, we find that there is substantial evidence rebutting the statutory presumption of applicability of District Law. And, giving further effect to the rule of *Cardillo*, we find that there is no substantial connection between the District of Columbia and the employer-employee relationship which is now before us. That degree of connection which does exist is no greater than that of any other State and certainly far less than that of Virginia, where all the incidents of employment, residence and public interest lie, or New York, where the accident occurred. For this reason we hold that the District Statute does not apply.

6. If we were to rest our decision on applicability of the District Statute alone, we would stop here. However, the evidence shows that there was a passage of time amounting to several years between the time in April, 1966, when Claimant concedes he was able to discuss his problems with his father and May, 1972, when a claim under the District of Columbia Statute was filed. During this period Claimant sought legal advice and investigated the options to him.

There was ample time to file a claim in the District of Columbia prior to 1972. The passage of the intervening years during which time no one ever asserted a claim corroborates our view that the District of Columbia had no interest in this claim. Be that as it may, to invoke the statute now, requires Claimant to bring himself within all of its requirements. Paramount among these is Section 13 (33 U.S.C. § 913) which provides:

> "§ 913. Time for filing of claims
>
> (a) The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, . . ., except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment.
>
> "(b) Notwithstanding the provisions of subdivision (a) of this section failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard."

Failure to comply with the requirements of this Section are a jurisdictional bar to recovery under the Act [*Young* vs. *Hoage,* 90 F2 395 (1937); *Pillsbury* vs. *United Engineering Co.,* 342 U.S. 197 (1952); *Aerojet-General Shipyards* vs. *O'Keefe,* 413 F2 793 (1969)].

In this instance the injury occurred on January 7, 1966, and was therefore barred by failing to file the claim prior to January 1967. The claim was actually filed six years later in May, 1972. Both Respondent's (Maryland Casualty and National) raised an objection on the grounds of timeliness as required by the statute and it was not thereby waived (33 U.S.C. § 913(b), Tr. 41, 45-47).

Claimant seeks to avoid the bar of the statute by his contention that he brought his claim within one year of the final payment of compensation made to him under the Virginia Statute. He contends that, as to him, those Virginia payments were voluntary because of the alleged fraud perpetrated upon him by his father, as President of Eureka, and the Carrier in bringing the claim in a jurisdiction selected by them, to the prejudice of Claimant's right to obtain benefits elsewhere.

We have already found, and we reiterate, that there is no evidence of fraud, deceit or misrepresentation, to Claimant's detriment in this record. We have also found that there is no basis upon which we could deny any finality to the Virginia Award. Therefore, to the extent that payments have been made pursuant to the Virginia Award, they are involuntary. As such they do not constitute a payment "without an award" within the meaning of the Act. [*Windrem* vs. *Bethlehem Steel Corporation,* 293 F.Supp. 1 (1968)].

As the Court pertinently observed in *Windrem:*

> "It is inconceivable that Congress intended that involuntary payments made pursuant to the award of a state tribunal would refer the period in which the injured employee could claim under the federal act. Such an interpretation would make the operation of the one year period of the limitations subject, in point of time, to finality of action initiated by an employee in a state tribunal with varied results depending upon the procedure and requirements of the particular state tribunal in which the employee prosecuted his claim.
>
> ". . . if the construction of the statutory period of limitations in the federal act which plaintiff urges . . . were adopted, there could be no uniform application thereof in the respective jurisdictions in which federal claims arise."

Further, even if the Virginia payments were voluntary, the Act itself contemplates that the voluntary payments made "without an award" are payments made by a respondent in discharge of a liability acknowledged to have been imposed by the Act (*Windrem* vs. *Bethlehem Steel Corporation,* supra). The Respondents herein certainly did not acknowledge any liability anywhere except in Virginia. In fact the essence of the fraud alleged by Claimant was that they avoided any liability in the District. We construe the Act to mean that it does not toll the Statute of Limitations until the cessation of voluntary payments made in other jurisdictions, but only those made pursuant to the Act. Finally, we think the principles cited in Windrem, supra, are equally applicable to cases of voluntary payment even without the limitation implied in the Act. The operation of the statute in the District would be subject to even greater vagaries if it were tolled by the unpredictable timing, duration, and characteristics of voluntary payments as interpreted by the laws of other jurisdictions. Accordingly, we hold that to the extent payments made herein could be construed as voluntary, they were not payments made in recognition of liability under the Act. They therefore did not toll the statute (33 U.S.C. 913) and the claim is also barred on that ground.

7. Since the claim is barred by failure to assert it in a timely fashion, Eureka, as a corporate entity, is not liable to Claimant under the Act. The liability of Eureka's Carrier, Maryland Casualty Company is no greater than that of Eureka. As Eureka is not liable due to passage of time, neither is Maryland Casualty.

8. Insofar as National Van Lines is concerned, its direct contract was with Eureka. It is, at most, only secondarily liable to Claimant [Probst vs. Southern Stevedoring Co., 379 F2 763 (1967); 33 U.S.C. 904, Globe Stevedoring Co. vs. Sheppeard, 57 F2 259 (1931)] as such, the failure to file a claim against Eureka in a timely fashion is just as much a failure to file against National. Not only that, Claimant admittedly failed to file a claim against National directly. We therefore hold that Claimant's claim against National is also barred by expiration af time.

9. In view of our conclusion as to our lack of jurisdiction we do not reach the merits of subordinate questions including that of Maryland Casualty Company liability elsewhere than in Virginia; that of whether National was in fact a "contractor" and Eureka a "subcontractor" within the meaning of the Act (33 U.S.C. 904); and, whether the proof of additional medical expense incurred since 1968, submitted by Claimant, is adequate to constitute substantial evidence upon which to rest an award in the absence of supporting invoices and details related to whatever credits may be due.

ORDER

The claim is dismissed as to all Respondents, i.e. Eureka Van and Storage Company, Inc., Maryland Casualty Company, National Van Lines, Inc., and Transport Indemnity Company, because of lack of jurisdiction to apply the District of Columbia Statute due to the absence of a substantial interest on the part of the District of Columbia and because of lack of jurisdiction due to the failure to file within the one year from the date of injury as prescribed by the Act.

Dated at Washington, D.C. this 10th day of July 1974.

/s/ JOHN I. NEVIN
John I. Nevin
Administrative Law Judge